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80-1400

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITIES SERVICE OIL COMPANY,

Petitioner,

v.

TIRE SALES CORPORATION, GEORGE NORDSTROM and EDWARD LAUGHLIN,

Respondents.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erroneously concluded that respondent had made out a *per se* tying arrangement case where it failed to prove:
   a) An agreement or understanding conditioning sale of the alleged tying product on purchase of the tied product.
   b) That the alleged tying arrangement impacted a "not insubstantial" amount of commerce.
   c) That the alleged tying product possessed sufficient "economic power" to impose an effective restraint of trade.
2. Whether the Court of Appeals erroneously used cases decided under Section 5 of the Federal Trade Commission Act to expand the antitrust tying offense beyond the boundaries defined by this Court.
3. Whether the Court of Appeals erred in judicially creating an antitrust defense to an otherwise valid claim for payment of the purchase price for goods received.

DISCLOSURE OF NON-WHOLLY OWNED SUBSIDIARIES

Petitioner, Cities Service Oil Company, a Delaware Corporation, in compliance with Rules 28.1 and 21.1(b) of the Supreme Court of the United States hereby submits the following list of its subsidiaries and affiliates, which are not wholly owned:

1. Alberta Gas Truck Line Co., Ltd.
2. Americanada, Ltd.
3. Apache Powder Company
4. Badger Pipe Line Company
5. Biroco Kirkland Mines, Ltd.
6. Calcasieu Chemical Corporation
7. Canagu Mines, Ltd.
8. Canyon Reef Carriers, Inc.
9. C-D Development Corporation
10. Christianson Prospecting Syndicate
11. Citco Union Texas Petroleo de Brasil Ltda.
12. Cit-Con Oil Corporation
13. CLAM Petroleum Company
14. Clean Seas, Inc.
15. Colonial Pipeline Company
16. Coltexo Corporation
17. Columbian Carbon Japan, Ltd.
18. Columbian Carbon Philippines, Inc.
19. Consolidated Ribago Mines, Ltd.
20. Continental & Columbian Carbon Nederland B.V.
21. Copebras, S.A.
22. Corpus Christi Area Oil Spill Control Association
23. Crescent Petroleum Company
24. Cynthia Gas Gathering Company Limited
25. Delaware Bay Transportation Company
26. Der-Der Prospecting Syndicate
27. Dixie Pipeline Company

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28. Downtown Plaza
29. East Texas Salt Water Disposal Company
30. Everglades Pipe Line Company
31. Explorer Pipeline Company
32. First Mortgage Development Finance Corporation
33. Gespa-Gesso Paulista, Ltda.
34. Grant County Development, Inc.
35. The Hardtner Petroleum Company, Inc.
36. Indonesian Enterprises, Inc.
37. Industries for Tulsa, Inc.
38. Kalayaan Realty Company, Inc.
39. Kansas Development Credit Corporation
40. Kaw Pipe Line Company
41. Keweenawan Prospecting Syndicate
42. Key Pipe Line Co., Inc.
43. Lake Charles Pipe Line Company
44. Meridian Industries, Inc.
45. Northward Developments, Ltd.
46. Oil Companies Institute for Marine Pollution Compensation, Ltd.
47. Oil Insurance Limited
48. Oklahoma Business Development Corporation
49. PASA Petroquimica Argentina S.A.
50. Penguin Yellowknife Mines, Ltd.
51. Petrogas Processing Limited
52. Pinebrayle Gold Mines Limited
53. Seadock, Inc.
54. Semitropic Distributing Company
55. Sevalco (Holdings) Limited
56. Shunmar Prospecting Syndicate
57. Sumdum Development Corporation
58. Sunrise Prospecting Syndicate
59. Syncrude Canada, Ltd.
60. Texaco-Cities Service Pipe Line Company
61. Texas-New Mexico Pipe Line Company
62. Tomdix Prospecting Syndicate
63. Waltricia Gold Mines Limited
64. West Shore Pipe Line Company
65. West Texas Gulf Pipe Line Company
66. Wolverine Pipe Line Company

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PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Cities Service Oil Company, respectfully prays that a Writ of *Certiorari* issue to review the Judgment and Opinion entered on October 7, 1980, by the United States Court of Appeals for the Seventh Circuit in this cause.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at ... F.2d ..., CCH 1980-81 Trade Cases, ¶63,683 (7th Cir. 1980) and a copy thereof is set forth in the Appendix at

1a.* The Order denying petitioner's Petition for Rehearing and Suggestion of Rehearing *in Banc* is set forth in the Appendix at 46a. The judgments of the United States District Court for the Northern District of Illinois granting the petitioner's motion for directed verdict and granting respondent's motion for summary judgment on the Counterclaim are set forth in the Appendix at 35a and 18a, respectively, the latter also being reported at 420 F.Supp. 1222 (N.D. Ill. 1976).

JURISDICTION

The Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

The judgment of the Court of Appeals of which review is sought was entered on October 7, 1980. A timely filed Petition for Rehearing and Suggestion of Rehearing *in Banc* was denied by the Court of Appeals on November 20, 1980. This Petition was timely within the time period specified by 28 U.S.C. §2101(c).

STATUTES INVOLVED

The pertinent statutes, set forth in the Appendix at pages 47a-49a, are: 15 U.S.C. §§1, 14, 15 and 45.

* All Appendix references are to the Appendix to this Petition.

STATEMENT OF THE CASE

In its Complaint, respondent Tire Sales Corporation (herein, "respondent" or "Tire Sales"), alleged that petitioner, Cities Service Oil Company (herein, "petitioner" or "Citgo"), violated Sections 1 and 2 of the Sherman Act (15 U.S.C. Sections 1 and 2) and Section 3 of the Clayton Act (15 U.S.C. Section 14).

Petitioner denied the material allegations of the Complaint and filed a Counterclain against respondent and its shareholders to recover amounts owed to petitioner for goods sold and delivered to respondent. In *Tire Sales Corp. v. Cities Service Oil Co.*, 410 F.Supp. 1222 (N.D. Ill. 1976), the District Court granted petitioner summary judgment on the Counterclaim in the amount of $42,580.03, and on certain of respondent's claims under Section 2 of the Sherman Act.

The case proceeded to trial only on respondent's claims that petitioner engaged in tie-in sales, a group boycott, exclusive dealing and territorial allocation in the sale of automotive tires, batteries and accessories ("TBA") to Citgo service station dealers in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act.

The District Court granted a motion for directed verdict at the close of respondent's case. The Court of Appeals reversed that decision holding only that respondent had made out a *prima facie* tying arrangement claim of *per se* liability under the antitrust laws.

The claims tried related to petitioner's dealings with Citgo retailers and Berry Tire Co. ("Berry"), a competitor of respondent, regarding TBA purchases by those dealers. Respondent claimed that petitioner illegal-

ly diverted TBA sales from respondent to Berry by conditioning the sale of gasoline and the lease of service stations to Citgo dealers (tying products) on those dealers' purchase of TBA from Berry (tied products). That conduct was claimed to be illegal *per se* under Section 1 of the Sherman Act, if either gasoline or station leases were the tying products, or under Section 3 of the Clayton Act if gasoline was the tying product.

From 1952 to 1975, respondent, a franchised Uniroyal distributor, operated a business in Evergreen Park, Illinois, selling tires and automotive accessories. During the period 1965 through 1970, repondent purchased TBA from petitioner for resale to Citgo stations under a "purchase-resale" arrangement (T. 1065).* Respondent purchased TBA from Citgo at the same wholesale prices respondent paid for TBA bought from TBA manufacturers (R. 1155-1158).

Effective December 31, 1970, Citgo terminated its agreement with Uniroyal to purchase TBA (PX 3). As a result of this termination, Citgo ceased dealing with Tire Sales as an Uniroyal TBA distributor, and dealt instead with Berry, a franchised Goodyear distributor.

One year later, in January, 1972, Uniroyal canceled respondent's dealership, leaving respondent approximately $80,000,00 in debt to Uniroyal (T. 361, 394-401). After cancellation of the Uniroyal dealership, respondent sold Hercules tires and had no problem obtaining those tires (T. 404). After unsuccessful efforts to acquire a Firestone dealership (T. 388), General Tire dealership (T. 401-403), Goodyear dealership (T. 395-396) and Goodrich dealership (T. 404), respondent became a

* "T." refers to transcript and "PX" to a plaintiff's exhibit.

Dunlop dealer in October, 1971 (T. 404). Respondent got into financial trouble with Dunlop and its dealership was terminated in 1975 (T. 1106). Shortly thereafter, in December, 1975, Tire Sales went out of business.

During the period of the alleged antitrust violations, Citgo began converting its "full service" stations to "Quik Marts" which did not sell TBA (T. 1237-1238), thus eliminating those stations as potential customers of respondent. During 1971 through 1975 the number of Citgo full-service stations in operation which had formerly been respondent's customers declined from 61 to 14 (PX 51). Respondent made no claim that the closing of "full-service" stations violated the antitrust laws.

The Court of Appeals concluded that the respondent's evidence, coming chiefly from eight former Citgo dealers, of the total of "40 or 50" Citgo dealers who were customers of respondent at the end of 1970 (T. 513-514, 572-576), was sufficient to state a *prima facie* tying case. The Court of Appeals concluded that respondent had stated a *per se* tying case from evidence that:

a) Two dealers were the subject of "direct threats" of lease cancellations or "other repercussions" if they didn't buy TBA from Berry,

b) Five other dealers "felt"* they had to go along with the switch to Berry to avoid "unfortunate repercussions,"

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* The District Judge correctly noted: "A few witnesses who testified that they felt threatened, felt threatened because of conclusions or inferences they drew either from the circumstances, or in a few instances, from remarks made to them. All of them felt vulnerable, as well they might, having leases and depending upon Citgo for their gas supply. But, this vulnerability is not, although it could be instrumentality of coercion, is not proof of coercion." (Appendix, 38A).

c) A Citgo sales representative "made it clear" to dealers that they were to switch their business to Berry,

d) Citgo sent some dealers a letter declining to extend credit card facilities to customers purchasing non-Citgo TBA,

e) Respondent's business suffered a "precipitous decline."

Respondent put on no evidence of a tying arrangement originating in voluntary agreements between petitioner and Citgo dealers. Instead, respondent contended, and the Court of Appeals found, that the evidence at trial was sufficient to support a *prima facie* claim that Citgo had tied station leases and gasoline sales to the purchase of TBA from Berry by coercing dealers to accept that tie-in.

The two dealers who were cited by the Court of Appeals as being the subject of "direct threats" of lease cancellation, or what that Court called "overt coercion" were the witnesses Raczkowski and Critchett. Raczkowski testified that a Citgo representative advised him that his lease wouldn't be renewed if he didn't buy from Berry. Raczkowski refused to buy from Berry but his lease was renewed (T. 235, 242, 244). Thus, there was no evidence that this alleged "threat" diverted any sales from respondent to Berry. Critchett testified that a Citgo representative "more or less hinted" that if he didn't buy from Berry he would lose his lease (T. 70, 84). This was the only "threat" directed to Critchett's lease. He thereafter continued to buy from respondent and other TBA sources and bought only $622.00 in TBA from Berry, which Critchett considered a "small amount" (T. 99-102).

The dealers named by the Court of Appeals as *feeling* they had to buy from Berry to avoid "unfortunate repercussions," each testified that neither his lease nor his gas supply was ever threatened (T. 130-131; 146-148; 250-260; 313-315 and 453-454). The Court of Appeals cited these dealers as being the subject of "covert coercion," and held that because these dealers were economically dependent on Citgo, its recommendation as to TBA purchases was "tantamount to command" (Appendix, 10a). However, there was no evidence at trial that the dealers were economically dependent on Citgo.

The testimony of the Citgo sales representative who, according to the Court of Appeals, "made it clear" that dealers were to buy TBA from Berry, consisted of a statement that although Citgo recommended that dealers buy from Berry, the dealers were free to choose where to buy their TBA (T. 177-178). The letter referred to by the Court of Appeals (PX 45) as declining Citgo credit cards for purchase of non-Citgo TBA, was written on October 1, 1974, almost five years after Citgo ceased doing business with respondent. That letter also informed dealers that they were free to purchase TBA from any source. No dealer testified that the unavailability of Citgo credit caused him to purchase from Berry rather than Tire Sales.

The Court of Appeals cited respondent's "precipitous decline" as evidence that Citgo's alleged antitrust violations deprived respondent of Citgo dealer customers. However, respondent successfully operated its TBA business from 1952 through 1965 without selling to Citgo stations and offered no explanation as to why the alleged loss of sales to Citgo dealers resulted in the demise of respondent's business. And, as noted, Citgo closed almost all of its full-service, TBA-purchasing ser-

vice stations during the 1970-1975 period when respondent's sales were suffering their "precipitous decline" (PX 51). Further, there was also ample evidence that respondent was not in sound economic shape before the implementation of the alleged restraint. For example, as of year-end 1970, Tire Sales had a negative net worth in excess of $17,000 (PX 25A, T. 884-886) which lead to rejection of a proposed loan to Tire Sales to acquire a Firestone dealership (PX 11).

The Court of Appeals also reversed the District Court's entry of summary judgment (Appendix 32a-34a) on Citgo's Counterclaim for the purchase price of goods received by respondent on the sole ground that the alleged antitrust claims were a defense to payment. The amount of Tire Sales' debt to petitioner is not in dispute.

ARGUMENT

INTRODUCTION

This case presents several important questions under the antitrust laws which this Court should decide to resolve conflicts with settled law as established by this Court and the Courts of Appeal of other Circuits. Further, the exercise of this Court's supervisory powers is necessary to stem the unwarranted expansion of *per se* antitrust liability which will stifle, not promote, competition.

The Court of Appeals held that respondent had made out a *prima facie* tying claim of *per se* liability under the antitrust laws. To reach that result, the Court of Appeals relied on inapt cases decided under the FTC Act, found a pattern of tying where none existed, ignored respondent's failure to prove elements essential to a *per se* case and created a prohibited antitrust defense to respondent's obligation to pay for goods it purchased.

The opinion of the Court of Appeals is in direct conflict with the decisions of this Court and Courts of Appeal of other Circuits because:

a) The Court eliminated the requirement of proof of a tie-in, *i.e.*, an agreement conditioning sale of the tying product on purchase of the tied product.

b) The Court refused to enforce the requirement that to prove a *per se* tying case, a plaintiff must prove the "economic power" of the tying product and that a substantial amount of commerce was affected by the tie-in.

c) The Court of Appeals created an "antitrust defense" to an otherwise valid contractual commitment to pay for goods purchased.

This Court should grant *certiorari* to review and resolve these conflicts because in each instance the Court of Appeals has acted to expand antitrust liability beyond the limit set by this Court.

The practical result of this expansion is a chilling effect on competition between a franchisor and those vendors selling goods not covered by the franchise agreement. The very language of the Court of Appeals, that a recommendation by a franchisor is tantamount to a command, forecloses a franchisor from even suggesting to its franchisee that such ancillary products be bought from the franchisor, rather than a competitor. This ruling sacrifices the interests of competition to protect one competitor and creates a presumption of *per se* antitrust illegality where a "dominant" franchisor is the defendant, despite plaintiff's failure to prove the elements necessary to *per se* liability.

This Court should grant *certiorari* to review and reverse the Court of Appeals' decision which violates the primary tenet that the antitrust laws were enacted to protect competition, not competitors. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

I.

THIS COURT SHOULD GRANT *CERTIORARI* TO REVIEW THE COURT OF APPEALS' EXPANSION OF *PER SE* TYING LIABILITY.

The Court of Appeals concluded that respondent had made a *prima facie* showing that Citgo tied gasoline and station leases to TBA purchases from Berry. The Court's decision was grounded on evidence of what it concluded

was a sufficient "quantum of pressure," exerted by Citgo on dealers to persuade them to purchase TBA from Berry, not respondent. This pressure, according to the Court, consisted of "overt coercion" in the form of threats to only *two* of the 40 or 50 Citgo dealers who were Tire Sales customers, plus "*covert coercion*" exerted on another five dealers, each of whom testified that he had never been threatened with loss of the alleged tying products. The Court grounded its decision on cases decided under §5 of the Federal Trade Commission Act, concluding that the "economic dependence" of dealers on Citgo, which was assumed but not proved, made a suggestion as to TBA purchases "tantamount to command."

In so ruling, the Court of Appeals erroneously expanded the *per se* tying doctrine by using cases decided under the FTC Act as a springboard and found evidence of a tie-in where this Court's definition of a tying arrangement was not met. There was no evidence from which the Court of Appeals could conclude that there existed an agreement or understanding, coerced or voluntary, between petitioner and those Citgo dealers who were respondent's customers requiring the purchase of TBA from Berry as a condition to receiving Citgo gasoline or leasing a Citgo station.

This Court had defined a tie-in as:

> ". . . an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product . . ." *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

Citgo's leases and distribution contracts contained no tying clauses. Citgo extracted no tying agreement from any dealer as a condition to receiving a lease or contract.

But respondent alleged that Citgo conditioned the continuation of such leases and contracts on the dealers' purchase of TBA from Berry. To prove that, it was necessary for respondent to prove that dealers were threatened with loss of the tying products if they did not buy TBA from Berry. Any proof short of that fails to establish an agreement that the tying products could be purchased only on the condition that the buyer also purchase the tied product, *i.e.*, fails to meet this Court's definition of a tie-in. By its ruling, the Court of Appeals created a conflict between its definition of a tie-in, and that established by this Court.

The Court of Appeals could find only two instances of alleged threatened loss of the tying products, both involving the same service station operated by two different lessees. The first, involving dealer Critchett, who said that a Citgo representative "more or less hinted" at this threat, diverted a *de minimis* total of $622.00 in TBA sales to Berry. The second, involving dealer Raczkowski, diverted none. That evidence is clearly not sufficient to support a reasonable inference of a pattern of such threats to the 40 or 50 dealers who were respondent's customers, especially when the respondent's other dealer witnesses testified that their leases and gas supplies were never threatened.

The Court of Appeals' decision is in direct conflict with the decision of the Sixth Circuit Court of Appeals in *Davis v. Marathon Oil Co.*, 528 F.2d 395, 400-402 (6th Cir. 1975), *cert. denied*, 429 U.S. 823 (1976). There, a former service station dealer contended that Marathon had imposed a TBA tie-in which violated the antitrust laws. There was evidence of salesmanship and "pressure" on the dealer to purchase "sponsored" TBA, and an "intimation" that buying the wrong TBA would

result in loss of the station. The Court concluded that because there were no express threats to cancel the lease, no tie-in was proved. Further, the Court noted that, assuming a tie-in had been proved, evidence of one such agreement with one dealer was not sufficient to support an inference that Marathon had a policy of imposing such tie-ins on its dealers. (528 F.2d at 401-402).

In the instant case, the Court of Appeals ruled that respondent had proved a tie-in without proving that threatened loss of the tying products diverted a substantial amount of commerce to respondent's competitor. The Court further ruled that respondent's evidence was sufficient to support an inference of tying as to those dealer witnesses who affirmatively testified that they were *not* threatened with loss of the tying products and as to those dealers who made up the balance of respondent's 40 or 50 dealer customers who did not testify at all. For those reasons, the decision of the Court of Appeals is in direct conflict with *Davis*.

Further, the Court of Appeals' decision is in direct conflict with decisions of this Court requiring evidence of an agreement or understanding that the tying product could be obtained only if the tied product were also purchased. This conditioning is the essence of a tie-in and without it no violation is proved. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *International Salt Co. v. United States*, 332 U.S. 392 (1947). To support its decision, the Court of Appeals created a new tying concept, "covert coercion," erroneously relied on cases decided under §5 of the FTC Act, and rendered a decision which prohibits a "dominant" franchisor from selling any goods not covered by the franchise agreement to the "dependent" dealer.

The Court of Appeals found that respondent had shown the "quantum of pressure" on dealers necessary to establish a tying claim. The Court derived its yardstick for that quantum from cases decided under §5 of the FTC Act finding the "commission" system of TBA distribution, in which an oil company receives a commission on TBA purchases, to be an unfair method of competition, in spite of the Court's conclusion that this system had been abandoned by Citgo at least four years prior to the alleged restraint. See, *Federal Trade Commission v. Texaco, Inc.*, 333 U.S. 223 (1968); *Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357 (1965).

The Court of Appeals concluded that the inherent nature of the petroleum distribution system as presented by the record before the FTC in those cases allowed an oil company to exercise dominant control over dealers in inducing them to purchase TBA products, on which the oil company received a commission, without overtly coercive tactics. The Court of Appeals held that in the context of a dealer's economic dependency on the oil company, which it assumed from *Texaco* and *Atlantic*, a recommendation to purchase TBA was "tantamount to command." The Court specifically concluded that the FTC Act cases ". . . serve to show that the quantum of coercion allegedly exercised here by Citgo was sufficient . . ." to establish a violation of the antitrust laws. (Appendix, 10a).

The heart of the Court of Appeals' decision creates a special exception to the definition of a tying arrangement applicable only to oil companies. That exception absolves plaintiffs of the need to show that purchase of the tied product was coerced by threatened loss of the tying product. That exception is not grounded on any

authority under the antitrust laws, but solely on an analysis of FTC Act cases. The Court relied on: *Federal Trade Commission v. Texaco, Inc.*, 333 U.S. 223 (1968), for the proposition that liability can be imposed where "No evidence of overtly coercive tactics was presented . . ." (Appendix, 9a); *Shell Oil Company v. Federal Trade Commission*, 360 F.2d 470 (5th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967), where liability was imposed in spite of the fact that there was ". . . no evidence of overtly coercive tactics . . ." (Appendix 9a) and *Goodyear Tire and Rubber Co. v. Federal Trade Commission*, 331 F.2d 394 (7th Cir. 1964), aff'd sub. nom. *Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357 (1965), for the proposition that liability ". . . does not depend upon overt coercive methods." (Appendix, 10a). The Court thus transplanted the §5 standard into the law of tying by relying on covert coercion as sufficient to prove a tie-in. This new standard, replacing this Court's definition of a tying arrangement, is embodied in the Court of Appeals' quote from its own decision in *Goodyear* (Appendix, 10a);

> Sophisticated methods of pressuring dealers into carrying sponsored TBA are as effectual as express covenants and open threats. 331 F.2d at 401.

The Court thus concluded that an oil company's recommendation to purchase TBA is "tantamount to command."

It is illuminating to note to what extent the Court of Appeals was willing to go to create a tie-in here. The Court found the fact that only two dealers testified to direct coercion could support an inference that other dealers went along "because they understood it to be potentially dangerous to rock the boat." (Appendix, 11a). But there was no evidence that any dealer had ever

heard of any other being the subject of "direct coercion." The Court cited the "rapidity with which Citgo dealers deserted plaintiff" as further support of that inference, thus erroneously suggesting that evidence of an effect demonstrates its cause (Appendix, 11a). But plaintiff remained in business for five years after the restraint was allegedly imposed. The Court also distorted a quotation from this Court's opinion in *Atlantic*. The Court of Appeals said:

> [T]he most impressive evidence of [the tying arrangement's] effectiveness was its undeniable success within a short time of its inception (Appendix, 11a).*

Yet, this Court specifically held that in *Atlantic* there was no tying arrangement. 381 U.S. at 369.

The legal effect of the Court of Appeals' ruling is the abandonment of established standards of *per se* liability, the expansion of that liability beyond the limits set by this Court, the adoption of an erroneous standard for liability grounded on the wrong body of law and the creation of a *de facto* private right of action under §5 of the FTC Act. The practical effect of that decision is to foreclose franchisors from competition in all but the market for goods or services covered by the franchise agreement.

Thus, a franchisor is foreclosed from recommending or suggesting, its salesmen are precluded from selling and it is barred from competing. An oil company must instruct its salesmen to not even mention that it sells

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* The quote in context is: "We will not repeat the manner in which this *sponsorship* was carried out. It is sufficient to note that the most impressive evidence of *its* effectiveness was its undeniable success within a short time of its inception." 381 U.S. at 368. (emphasis added).

TBA for fear that such suggestion be deemed "tantamount to command." That is the burden on competition created by the Court of Appeals' ruling.

The FTC Act is not one of the antitrust laws, and a private claim for damages arising from violation of that Act is not actionable under the antitrust laws. 15 U.S.C. §15; *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 376 (1958), *reh. denied*, 355 U.S. 967 (1958); *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973). As this Court has noted, the FTC is charged with the practical application of that statute intended to attack a broader range of anticompetitive conduct than that proscribed by the antitrust laws, thus eliminating conduct which is not itself an antitrust violation. See, *e.g.*, *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394 (1953), *reh. denied*, 345 U.S. 914 (1953); *Federal Trade Commission v. R. F. Keppel & Brothers*, 291 U.S. 304 (1934). This Court held in *Federal Trade Commission v. Brown Shoe Co.*, 384 U.S. 316 (1966):

> [T]he Commission has broad powers to declare trade practices unfair. This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts *even though such practices may not actually violate these laws*. 384 U.S. at 320 (emphasis added).

Therefore, this Court's affirmances of the FTC rulings in *Atlantic* and *Texaco*, do not create a standard of liability under the antitrust laws. Those cases merely represent this Court's affirmance of the FTC's discharge of its statutory duty to define unfair methods of competition. Nonetheless, the Court of Appeals directly applied those decisions as the standard of *per se* antitrust liability in this case.

That ruling conflicts with the decision of the Tenth Circuit Court of Appeals in *Belliston v. Texaco, Inc.*, 455 F.2d 175, 183-184 (10th Cir. 1972), that evidence that defendant engaged in the "commission" system of TBA distribution, which was declared an unfair method of competition under §5 of the FTC Act, was sufficient to establish an antitrust violation. The Court there noted this Court's ruling in *Atlantic* that ". . . There are many unfair methods of competition that do not assume the proportion of antitrust violations." 381 U.S. at 369. The Court of Appeals' attempt to distinguish *Belliston* by noting that there it was stipulated that plaintiff had no evidence of direct coercion is unavailing because the Court relied heavily on the "inherent nature of the petroleum distribution system," in the face of the *de minimis* evidence of direct coercion, to find a non-existent pattern of tying.

This Court has repeatedly stated that antitrust *per se* rules are justified only where the pernicious nature of the restraint is well established, and the likelihood that a rule of reason analysis would produce evidence of pro-competitive effects is minimal. This Court has also often noted that one of the advantages of *per se* rules is that businessmen are given fair notice that a specific type of conduct will be found to violate the antitrust laws without further inquiry, allowing them to conduct themselves accordingly. See, *e.g.*, *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609 n. 10 (1972); *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n. 16 (1977); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978).

The necessary logical and equitable corollary to that rule is that where this Court has defined the elements of

a specific practice as *per se* illegal, the Courts ought adhere to that definition. Here, the Court of Appeals applied a standard derived from cases decided under §5 of the FTC Act to expand *per se* liability beyond this Court's definition. The conflict between the decision of the Court of Appeals and the definition of a tying arrangement will create confusion and uncertainty in application, causing franchisors to withdraw from competition rather than risk treble damage liability. This Court ought grant *certiorari* to review that decision.

II.

THIS COURT SHOULD GRANT *CERTIORARI* TO REVIEW THE COURT OF APPEALS' DECISION IMPOSING *PER SE* TYING LIABILITY WITHOUT PROOF OF THE "ECONOMIC POWER" OF THE TYING PRODUCT OR THAT THE TIE-IN AFFECTED A "NOT INSUBSTANTIAL" AMOUNT OF COMMERCE.

This Court has made tying arrangements illegal *per se* under the Sherman Act only where the tying product possesses appreciable "economic power" in its market and a "not insubstantial" amount of commerce has been foreclosed by the tie-in. *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 608-609 (1953); *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 6 (1958); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 501-504 (1969); *United States Steel Corp. v. Fortner Enterprises, Inc. (Fortner II)*, 429 U.S. 610, 614-622 (1977). If the alleged tying product is a commodity (in this case, Citgo petroleum products), the tie-in may be illegal *per se* under §3 of the Clayton Act if either the economic power or substantiality test is met. *Times-Picayune*, *supra*, at 608-609.

The Court of Appeals held that respondent had proved a *per se* tying case despite the fact that proof of the economic power and substantiality elements was lacking. In doing so, the Court relied on the District Court's findings on the cross motions for summary judgment, as no evidence directed to either element was adduced at trial. The District Court held that the economic power of the alleged tying products was established by the petitioner's "position in relation to its dealers." Further, the substantiality test was satisfied, said that Court, by the total dollar value of all TBA purchased by Citgo in 1972 for resale to all dealers in the Chicago area.

Respondent failed to prove that Citgo's products (gas and station leases) had any competitive advantage over the products of Citgo's competitors or that Citgo had any competitive advantage in the markets for these products. The conclusion of the Court of Appeals that respondent nonetheless proved a *per se* illegal tying arrangement is in direct conflict with the decision of this Court in *United States Steel Corp. v. Fortner Enterprises, Inc., (Fortner II)*, 429 U.S. 610 (1977). That case clearly demonstrates that respondent was required to prove that the tying products enjoyed some unique characteristic or competitive advantage which so enhanced the desirability of those products in their own markets as to overcome any presumption that the tied product was purchased on its competitive merits alone.

In *Fortner II*, defendant conditioned 100 percent financing (the tying product) upon the purchase from defendant of a prefabricated house (the tied product). This Court concluded that plaintiff had proved all elements of a *per se* illegal tying arrangement except one—sufficient economic power in the tying product to

appreciably restrain competition in the market for the tied product. This Court concluded that although the defendants were subsidiaries of one of the nation's largest manufacturing corporations, there was no indication that this fact gave them any cost advantage over competitors in the credit market. Further, this Court found the fact that the tying arrangement was imposed upon numerous house purchasers, who paid inflated prices, to be insufficient evidence of the economic power of the tying product. Also, the unique character of the 100 percent financing failed to support the conclusion that this tying product was imbued with sufficient economic power without proof that defendant's competitors were foreclosed from providing the same financing.

The essence of *Fortner II* is that economic power of the tying product is present only where that product has some advantage when measured against competing products. The economic power inquiry is not satisfied by a showing of disparity in bargaining power, size or capital between the buyer and seller or by a showing that the buyer was economically dependent on the seller.

Proof that Citgo had a position of economic superiority with respect to Citgo dealers does not satisfy the economic power test because there was no evidence that Citgo's products had some superiority over those of its competitors. In confining the focus of the economic power inquiry to a single brand of gasoline and a single service station mark, the District Court failed to apply the economic power standard set by this Court. In finding that a *per se* tying case had been proved nonetheless, the Court of Appeals ruled in direct conflict with the decisions of this Court and the other Courts of Appeal.

For example, in *Phillips v. Crown Central Petroleum Corp.*, 602 F.2d 616 (4th Cir. 1979), the Court of Appeals reversed a judgment that Crown illegally tied the lease of its stations or the sale of its gasoline to the purchase of its brands of motor oil, holding that the requisite economic power to support a finding of *per se* illegality had not been shown. The Court of Appeals rejected the argument that economic power was demonstrated by the mere fact that defendant had successfully imposed the tie-in, holding that evidence of the economic dependence of a retailer on its supplier was not sufficient proof of the economic power element. The Court also concluded that plaintiff was required to show that defendant had some competitive advantage in the lease market or gasoline market by virtue of, for example, barriers to market entry by competitors, and that having failed to prove that competitive advantage, plaintiff failed to prove that the tie-in was *per se* illegal.

In *Yentsch v. Texaco, Inc.*, 630 F.2d 46 (2nd Cir. 1980), the Court also rejected plaintiff's *per se* tying arrangement claim for failure to prove the economic power of the tying product. In *Yentsch* the plaintiff claimed that he was required to purchase trading stamps and promotional materials as a condition to his continuation as a Texaco dealer. The Court held that plaintiff failed to state a *per se* tying arrangement claim because he failed to show any competitive advantage which Texaco enjoyed in the market for the tying product.

Also, in *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419 (5th Cir. 1978), *cert. denied*, 444 U.S. 831 (1979), the Court applied the *Fortner II* standard to a tie-in between the sale of young chickens, the purchase of eggs and the sale of feed. Defendant clearly conditioned its sale of young chickens to producers, and its purchase of

eggs from them, on the producers' agreement to buy all their feed from defendant. The Court of Appeals reversed the judgment on the ground that plaintiff had not shown the requisite economic power in the tying products. The Court rejected evidence of the mere existence of tying arrangements and the uniqueness of the package as sufficient to establish economic power and concluded that only by establishing some economic advantage in the market for the tying product not shared by defendant's competitors could uniqueness be considered proof of economic power.

In the instant case, respondent introduced *no evidence* of any competitive advantage possessed by either of the alleged tying products—Citgo gasoline or Citgo station leases. Plaintiff introduced *no evidence* of any cost advantage enjoyed by Citgo in the tying products, *no evidence* of barriers to market entry in either market and *no evidence* of any unique competitive advantage enjoyed by Citgo's products. As a result, plaintiff failed totally to prove that Citgo possessed the requisite economic power to impose a significant restraint of trade.

Further, plaintiff's evidence of substantialtity of commerce allegedly forclosed is not sufficient to state a *per se* tying case. This Court clearly held in *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969), that substantiality must be assessed in terms of the total amount of commerce actually foreclosed by the tying arrangement, requiring analysis of the total amount of commerce foreclosed to respondent in all instances where conditioning of a Citgo dealership on purchase of TBA from Berry was proved. Evidence of the total amount of TBA purchased by Citgo for resale to all of Citgo's Chicago area dealers, where the only

tying evidence related to a handful of those dealers, does not establish substantiality. Further, even if the equivocating testimony of dealer Critchett that a Citgo representative "more or less hinted" that he must buy from Berry or lose his station is sufficient to establish a tie-in, the total amount of commerce diverted to Berry was $622.00. That amount is not only insubstantial, it is *de minimis.*

Therefore, the substantiality and economic power elements of an illegal tie-in were not proved. This Court should grant *certiorari* and reverse the Court of Appeals on this ground.

III.

THIS COURT SHOULD GRANT *CERTIORARI* TO REVIEW THE COURT OF APPEALS' DECISION THAT AN ALLEGED ANTITRUST VIOLATION WHICH IS CLAIMED TO HAVE MADE RESALE OF GOODS MORE DIFFICULT IS A DEFENSE TO PAYMENT OF THE PURCHASE PRICE FOR THOSE GOODS.

The Court of Appeals reversed the District Court's summary judgment against respondent on Citgo's Counterclaim for goods sold and delivered to Tire Sales (Appendix, 32a). The Court of Appeals found that there was no dispute as to the amount due and owing to Citgo, but ruled that the claimed antitrust violations prevented resale of the goods, and held that those claims, if proved, would be a defense to payment of the purchase price for the goods received.

That decision of the Court of Appeals is in direct conflict with the line of decisions of this Court, of which *Kelly v. Kosuga*, 358 U.S. 516 (1959) is the latest, as well as numerous decisions of the Courts of Appeal properly confining the "antitrust defense" to those situations

where enforcement of the contract would require implementation of the precise conduct prohibited by the antitrust laws.* *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902); *D. R. Wilder Manufacturing Co. v. Corn Products Refining Co.*, 236 U.S. 165 (1915); *A. B. Small Co. v. Lamborn & Co.*, 267 U.S. 248 (1925); *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227 (1909); *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947). In *Kelly*, this Court refused to allow a Sherman Act violation to be raised as a defense to payment of the contract price, and concluded that the claimed Sherman Act violation provided no defense "Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act. . . ." 358 U.S. at 520.

The Court of Appeals transformed an element of antitrust damages into an affirmative defense to contractual liability in spite of the fact that the contract itself did not violate the antitrust laws. Its decision, which conflicts directly with the explicit policy established by this Court and followed by the Courts of Appeal, judicially creates a new defense to contractual

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* A partial, but representative, list of the decisions of the other Courts of Appeal which have rejected the "antitrust defense" where the specific obligation sought to be enforced did not itself violate the antitrust laws includes: *Dickstein v. duPont*, 443 F.2d 783, 786 (1st Cir. 1971); *Viacom International, Inc. v. Tandem Productions, Inc.*, 526 F.2d 593, 596-599 (2nd Cir. 1975); *Lewis v. Seanor Coal Co.*, 382 F.2d 437, 441 (3rd Cir. 1967), *cert. denied*, 390 U.S. 947 (1967); *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 13-15 (4th Cir. 1971); *Sunshine Packers, Inc. v. American Can Co.*, 395 F.2d 86, 87-88 (5th Cir. 1968); *Atlantic Richfield Co. v. Malco Petroleum, Inc.*, 471 F.2d 1258, 1260-1261 (6th Cir. 1972); *Sun Oil Co. v. Vickers Refining Co.*, 414 F.2d 383, 389-390 (8th Cir. 1969); *El Salto, S.A. v. PSG Co.*, 444 F.2d 477 (9th Cir. 1971), *cert. denied*, 404 U.S. 940 (1971).

obligations. Further, that decision gives parties the right to recover three times the cost of goods purchased as an element of damages and to avoid payment for the goods purchased as well, thus creating a quadruple damage remedy.

The decision of the Court of Appeals is in direct conflict with the decisions of this Court and those of other Courts of Appeal, and this Court ought grant *certiorari* to reject this erroneous expansion of the Sherman Act and unwarranted infringement of private contracts.

CONCLUSION

For the foregoing reasons, this petition for Writ of *Certiorari*, should be granted.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 76-1398

TIRE SALES CORPORATION, et al.,

Plaintiffs-Counterdefendants-Appellants,

v.

CITIES SERVICE OIL COMPANY,

Defendant-Counterplaintiff-Appellee.

No. 80-1187

TIRE SALES CORPORATION,

Plaintiff-Appellant,

v.

CITIES SERVICE OIL COMPANY,

Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 C 599—**John F. Grady and Frank J. McGarr**, *Judges.*

HEARD SEPTEMBER 12, 1980—DECIDED OCTOBER 7, 1980*

Before CUMMINGS and PELL, *Circuit Judges*, and DUMBAULD, *Senior District Judge*.**

* This appeal was originally decided by unreported order on October 7, 1980. See Circuit Rule 35. The Court has subsequently decided to issue the decision as an opinion.

** The Honorable Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, is sitting by designation.

CUMMINGS, *Circuit Judge*. Plaintiff appeals in No. 80-1187 from the order of the district court granting a directed verdict in favor of defendant on plaintiff's private treble-damage action brought under Section 4 of the Clayton Act (15 U.S.C. § 5) for alleged violations of Section 1 of the Sherman Act (15 U.S.C. § 1) and Section 3 of the Clayton Act (15 U.S.C. § 14) commencing January 1, 1971. Plaintiff appeals in No. 76-1398 from the order of the district court granting summary judgment in favor of defendant on its counterclaim for $42,580.03 plus interest for goods sold to plaintiff in 1970 and 1971. The appeals were briefed and argued together. We now reverse in both No. 80-1187 and No. 76-1398 and remand the case for trial.

I

Plaintiff Tire Sales, an Illinois corporation, was until 1975 a wholesale distributor of tires, batteries and automotive accessories in Evergreen Park, Illinois, on the south side of Chicago. Defendant Cities Service Oil Company (Citgo) is engaged in the production and distribution of petroleum and other products. It markets its gasoline in the Chicago metropolitan area to operators of Citgo service stations who are franchisees or lessees of Citgo and who purchase all their oil and gasoline requirements from Citgo. Citgo provides its dealers with credit card facilities and is responsible for making repairs and improvements on the leased premises.

From 1952 through 1965 plaintiff was a franchisee of Uniroyal, Inc. and sold tires, batteries and accessories (TBA) at retail to individual and commercial accounts in the open market. At the end of 1964, Uniroyal signed a sales commission agreement with Citgo whereby Uniroyal agreed to pay 7½% commissions to Citgo on sales of Uniroyal tires to independent Citgo service stations. Uniroyal initially attempted to handle and warehouse its own TBA sales to the Citgo stations, but this proved a failure. In 1965, Uniroyal and Citgo therefore asked plaintiff to sell Uniroyal TBA to approximately 50 independent Citgo stations on the south side of Chicago. Plaintiff furnished Citgo and Uniroyal with monthly

reports of its sales to those dealers, thus enabling Citgo to calculate what commissions to collect from Uniroyal. Both plaintiff and Citgo representatives would call on those dealers and solicit orders for TBA from plaintiff.

Subsequently, sales commission arrangements similar to the one executed by Uniroyal and Citgo were invalidated as unfair trade practices in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45). See, *e.g.*, *Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357. Citgo and Uniroyal consequently entered into a new agreement in 1966, giving Citgo a middleman's profit instead of commissions on sales made to its independent service stations. Under the new arrangement, Citgo bought directly from Uniroyal and then informed plaintiff that in order to continue as the authorized TBA distributor for Citgo dealers, plaintiff would have to buy that portion of its TBA from Citgo rather than from Uniroyal. Under a written agreement of August 14, 1967, plaintiff bought from Citgo a quantity of TBA equivalent to the quantity plaintiff sold to Citgo dealers. Citgo received a 7 to 8½% profit on these sales, consisting of the difference between the amount Citgo paid Uniroyal for TBA and the amount for which Citgo sold TBA to plaintiff. Plaintiff and Citgo did business under this purchase-resale arrangement for approximately three years, during which time Citgo representatives continued to promote and monitor its dealers' TBA business with plaintiff.

At the end of 1970, Citgo terminated its agreement with Uniroyal to purchase TBA for resale to Citgo dealers. Accordingly, Citgo could no longer sell Uniroyal tires to plaintiff or take a profit on the sale of tires purchased by plaintiff directly from Uniroyal and sold to Citgo dealers. As a result, Citgo ceased doing business with plaintiff as a TBA distributor and dealt instead with Berry Tire Co. (Berry Tire), a franchised Goodyear dealer. Citgo had purchase-resale arrangements with Goodyear and Firestone as well as Uniroyal. Thereafter, plaintiff's TBA sales to Citgo dealers decreased dramatically. Plaintiff fell behind in its payments to Uniroyal, which in 1972 cancelled plaintiff as one of its fran-

chisees. Plaintiff at that time owed Uniroyal $80,000, which it paid off over the course of the next year. Plaintiff also owed Citgo a similar amount for TBA inventory purchased before the termination of the purchase-resale agreement and running into 1971 according to defendant's counterclaim (par. 2 of R. Item 7). Plaintiff reduced this indebtedness to $42,580.03. From 1971 through 1975, plaintiff's financial situation, then as a Dunlop franchisee, steadily deteriorated and in December 1975 it went out of business.

In 1974, Citgo filed suit against plaintiff to recover the outstanding debt. Plaintiff then filed the present antitrust suit alleging that Citgo conspired with its independent dealers in the Chicago area and with distributors of Goodyear and Firestone tires[1] in the same area to restrain trade, to have tie-in sales in the sale of tires to those stations, to boycott plaintiff, to limit and allocate TBA purchases by Citgo dealers instead to Goodyear and Firestone tires and to TBA distributor Berry Tire and conditioned sale of gas and oil to its dealers on the understanding that they would not purchase TBA from plaintiff or other competitors of Citgo. Plaintiff further claimed that Citgo's allegedly illegal activities caused them $970,000 actual damages or $2,910,000 in treble damages as provided by Section 4 of the Clayton Act. Accordingly, plaintiff sought judgment in the latter amount plus costs and reasonable attorney's fees. Defendant denied these allegations and counterclaimed for $42,580.03, plus interest, as the amount still due under the purchase-resale agreement and in 1971. Plaintiff defended the counterclaim on the ground that no balance was due Citgo because the debt arose as a result of an antitrust conspiracy and illegal tie-in sales.

On March 4, 1976, Judge Grady, to whom this case was then assigned, filed a memorandum order (410 F.Supp. 1222) disposing of the issues raised by the

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[1] It subsequently developed that Berry Tire was the only distributor involved and that it dealt solely in Goodyear tires. Consequently, any later references to Firestone herein are surplusage. See Reply Brief at 7.

parties' cross-motions for summary judgment. He entered judgment in favor of Citgo with respect to plaintiff's charges of reciprocal dealing, monopolization and attempted monopolization,[2] but refused judgment on a conspiracy to monopolize charge. Plaintiff, however, withdrew this latter charge before trial, and none of the foregoing claims are now in issue. Judge Grady also refused summary judgment with respect to the claims of tie-in sales, group boycott and exclusive dealing in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act. On these claims, he found that Citgo's position gave it the power to impose TBA tie-in sales on an appreciable number of buyers in the market and that the requisite amount of commerce was "indisputably demonstrated," but that there was conflicting evidence as to whether Citgo's dealers "were induced [by Citgo] to make TBA purchases [from Berry Tire] for reasons other than those which motivate a reasonable buyer in a free market—namely, price, quality, and the like," so that a trial was required to determine whether Citgo's dealers had been illegally induced by Citgo to buy TBA from Berry Tire rather than plaintiff.[3] 410 F.Supp. at 1227-1228.

Finally, Judge Grady entered judgment for Citgo on its counterclaim because the "defense of an antitrust violation is limited to situations where the court would be enforcing the precise conduct condemned by the [Sherman] Act," but stayed the judgment until final disposition of the other issues in the case. 410 F.Supp. at 1232. Thereafter, the plaintiff filed a protective notice of appeal with respect to the judgment against it on the

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[2] Judge Grady found that plaintiff had not shown that Citgo controlled even close to a monopoly share of the relevant market, which he defined as "the wholesale market of TBA on the south side of Chicago." 410 F.Supp. at 1230-1231.

[3] Judge Grady also held that Citgo's alleged attempts to secure a Goodyear or Firestone distributorship for plaintiff so that it could continue its dealings with plaintiff would not constitute a defense to the antitrust claims. 410 F.Supp. at 1229.

counterclaim. That appeal was assigned No. 76-3198 by the Clerk of this Court.

The trial on the merits began on December 10, 1979, before a jury with Judge McGarr, to whom the case had been reassigned, presiding. On January 9, defendant's motion for a directed verdict at the close of the plaintiff's case was granted and the jury was discharged. On the same date, judgment was entered that the plaintiff take nothing and that the action be dismissed on the merits. In early February, plaintiff filed its notice of appeal and it was assigned No. 80-1187 in this Court.

II

As noted above, Judge Grady in refusing summary judgment on plaintiff's tie-in sales claim found that a trial was necessary on the question whether Citgo had illegally coerced its dealers to switch their TBA business from plaintiff to Berry Tire. At the close of plaintiff's case at trial, however, Judge McGarr directed a verdict against plaintiff, finding that

(1) there was insufficient evidence to establish a *prima facie* case that Citgo had illegally tied TBA sales to leases or gas supplies;

(2) there was insufficient evidence to establish a *prima facie* case that Citgo had illegally coerced its dealers not to buy from plaintiff after 1971 when Berry Tire was substituted as the authorized dealer; and

(3) there was inadequate evidence to establish the amount of plaintiff's alleged losses and insufficient evidence to establish that Citgo had caused these losses. (App. 12-14.)

In our view, the trial court erred in not reviewing the evidence in the light most favorable to the plaintiff and in not giving plaintiff the benefit of all inferences which the evidence fairly supports even though contrary inferences might reasonably be drawn. This standard is compulsory for ruling on a motion of directed verdict (*Continental Ore Co. v. Union Carbide & Carbon Corp.*,

370 U.S. 691, 696) and the trial court is, of course, not to weigh the credibility of witnesses. *Brady v. Southern Railroad*, 320 U.S. 476, 479-480. As this Court has stated, a motion for directed verdict must be denied "where the evidence is such that reasonable men in a fair and impartial exercise of their judgment may draw different conclusions therefrom." *Hannigan v. Sears, Roebuck and Company*, 410 F.2d 285, 287 (1979). Viewing the record with the foregoing principles in mind, we conclude, with all due respect, that plaintiff was entitled to a jury verdict.[4]

A. *Sufficiency of Evidence of Coercion*

The central disputed issue of fact in this case is whether Citgo dealers ceased doing business with plaintiff because they concluded on their own or through legitimate salesmanship efforts by Citgo that plaintiff's products were no longer preferable to those offered by competitors or because Citgo used its economic power to coerce them into doing so. There is no question but that plaintiff has presented evidence that Citgo "pressured" its dealers into switching their TBA business from plaintiff to Berry Tire. This evidence includes, *inter alia*, testimony by two dealers of direct threats of lease cancellations or other repercussions if they didn't go along with Citgo's switch to Berry Tire;[5] testimony by

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[4] In approving the assessment of the plaintiff's evidence contained in Judge Grady's 1976 opinion herein, we are not relying on the law of the case doctrine. Judge McGarr was of course entitled to assess the evidence independently. See *Champaign-Urbana News Agency, Inc. v. J. L. Cummins News Co., Inc.*, ... F.2d ....., ... (7th Cir. No. 79-2290, decided September 24, 1980) at slip op. 6-7.

[5] Former Citgo dealer Critchett testified that Citgo salesman Clay showed him a list of Citgo dealers' purchases from Berry Tire and hinted that if Critchett did not also buy from Berry Tire he would not be a Citgo dealer any more (Tr. 70, 84). Critchett also testified that Clay told him that if he expected his employee Raczkowski to be permitted to take over the station, Critchett "damn well better buy from Berry Tire" in

(Footnote continued on following page)

other dealers that they felt they had to go along with the switch to avoid unfortunate reverberations;[6] testimony by a Citgo sales representative that Citgo made it clear to its dealers that they were to switch their business from plaintiff to Berry Tire (Tr. 177-178, 181); a letter from a Citgo sales manager informing Citgo dealers in the area that Citgo would not make available its credit card facilities in connection with the sale of any TBA purchased from its competitors (App. 97); and the precipitous decline of plaintiff's TBA business with Citgo dealers following Citgo's decision to switch to Berry Tire (see statistics in Plaintiff's Brief at 23 and Reply Brief 19).

Citgo argues, however, that the trial court apparently found that the evidence offered was insufficient to go to

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[5] *continued*
the interim (Tr. 78). Citgo dealer Raczkowski testified that after he succeeded Critchett, Clay told him that "the station had to be run the way that the oil company wanted it to be run," that Citgo wanted all the Citgo dealers to do business with Berry Tire and that Raczkowski was supposed to buy his TBA from Berry Tire (Tr. 243). He testified further that in October 1973 Citgo representative Peters told him that Citgo would throw him out unless he bought more TBA from Berry (Tr. 248).

[6] Citgo dealer Hafer testified that he started buying TBA from Berry Tire because of "a little coercion" from Citgo even though Hafer would have preferred to continue dealing with plaintiff (Tr. 456, 479-480). Former Citgo dealer Cerny testified that he knew that Citgo was phasing out its stations and that he knew it would be better for him when his lease came up for renewal if he went along with the switch (Tr. 270). Former dealer De Stefano testified that he believed his lease would be cancelled if he didn't switch from plaintiff to Berry Tire. When asked whether anyone from Citgo had threatened his lease, De Stefano replied, "I don't have to be told certain things" (Tr. 320). Citgo dealer Kulovitz testified that a Citgo representative introduced him to a Berry salesman and told him to buy his TBA merchandise from Berry Tire from that day on (Tr. 140). Kulovitz stated on cross-examination that "they didn't put a gun to my head, I'll grant you that," but said he went along with the switch to Berry Tire because "you had to lean towards them [Citgo] or otherwise they could have made it rough" for him (Tr. 147).

the jury because, even if believed, it did not prove the quantum of pressure necessary to establish coercion that would constitute a violation of the antitrust laws. We disagree. As Judge Grady concluded in passing on the cross-motions for summary judgment:

> "The plaintiff has produced evidence that the defendant coerced its dealers into buying TBA from Berry. Such coercion included threats to cancel service station leases and refusal to make repairs. * * * Even in the absence of overt coercion, dealers may have been induced to purchase from Berry Tire because of the inherent power which the defendant possessed as the company upon which the dealers depended in almost every aspect of their business." 410 F.Supp. at 1227.
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> * * * * *
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> "The plaintiff has produced facts similar to those involved in *Texaco* and *Shell*; if believed, they would show that the reason dealers were buying TBA from Berry rather than Tire Sales was that Berry was the defendant's distributor and not because Berry's TBA were inherently preferable." 410 F.Supp. at 1228.

In *Federal Trade Commission v. Texaco Inc.*, 393 U.S. 223, Texaco was held to have violated Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) because the oil company, as a result of the inherent nature of the petroleum distribution system, exercised dominant control over its dealers in inducing them to buy sponsored TBA products. No evidence of overtly coercive tactics was presented in that case. In *Shell Oil Company v. Federal Trade Commission*, 360 F.2d 470 (5th Cir. 1966), certiorari denied, 385 U.S. 1002, Shell was on similar facts also held to have violated Section 5 of the Federal Trade Commission Act. Again there was no evidence of overtly coercive tactics, but Shell's economic dominance caused a substantial number of its dealers to purchase Shell-sponsored TBA.

In *Goodyear Tire & Rubber Company v. Federal Trade Commission*, 331 F.2d 394 (1964), affirmed *sub nom. Atlantic Refining Co. v. Federal Trade Commission*, 381

U.S. 357, this Court held that Atlantic Refining Company violated Section 5 of the Federal Trade Commission Act even though the evidence relating to overt coercive tactics was not extensive but only isolated. In so holding, we stated in language applicable to the coercion issue here:

> "Atlantic's power to cause its dealers to carry either Goodyear or Firestone TBA does not depend upon overt coercive methods. The totality of facts surrounding the relationship between the oil company and the dealers points to one conclusion: the oil company is able to exert sufficient economic power over its dealers so that for all practical purposes they are required to carry sponsored TBA." 331 F.2d at 401.

In short, a "recommendation" in the context of dealers' economic dependency upon an oil company was considered "tantamount to command." *Ibid.*

Although the above-discussed cases were not decided under the Sherman or Clayton Acts, they serve to show that the quantum of coercion allegedly exercised here by Citgo was sufficient, unless refuted by Citgo's evidence, to cause its dealers to desert plaintiff for Berry Tire in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act. Citgo argues in effect that any pressure exerted on dealers to purchase sponsored TBA which falls short of overtly coercive acts, such as actual lease cancellations, is insufficient as a matter of law to establish an antitrust violation. But, as this Court stated in the *Goodyear* case, *supra*:

> "Sophisticated methods of pressuring the dealers into carrying sponsored TBA are as effectual as express covenants and open threats." 331 F.2d at 402.

Plaintiff has in fact in this case presented some evidence of overt coercion in addition to evidence of a pattern of covert coercion. Citgo would have us ignore this evidence because it allegedly involved only a few dealers and because Citgo did not make good on its sales representatives' threats to cancel leases. This misses the point. An oil company's threat to cancel a franchisee's

lease is overt coercion whether it is ultimately acted upon or not. Similarly, the fact that only a few dealers testified to direct coercion can easily support an inference that other dealers acquiesced in Citgo's switch to Berry Tire without any need for overtly coercive acts because they understood it to be potentially dangerous to rock the boat. The rapidity with which Citgo dealers deserted plaintiff after Citgo's switch to Berry Tire lends further support to such an inference. Cf. *Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357, 368 ("[T]he most impressive evidence of [the tying arrangement's] effectiveness was its undeniable success within a short time of its inception.").

Finally, it is true that much—although certainly not all—of plaintiff's evidence of coercion is circumstantial. It is well settled though that agreements, arrangements or conditions that unreasonably restrain trade by boycotts or tie-ins may be inferred from the circumstances surrounding a course of dealing. *United States v. Parke, Davis & Co.*, 362 U.S. 29; *Osborn v. Sinclair Refining Co.*, 286 F.2d 832, 837 (4th Cir. 1969). We recognize that a jury might decide against plaintiff on the basis of the evidence presented. But viewing the evidence in the light most favorable to the plaintiff, and giving the plaintiff the benefit of all inferences which the evidence fairly supports, we conclude that reasonable persons in a fair and impartial exercise of judgment might also decide that Citgo, the profit-taking middleman, exercised its economic power and coerced its dealers to terminate their TBA business with plaintiff in favor of their new distributor Berry Tire in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act. See, *e.g.*, *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1217 (9th Cir. 1977); *Osborn v. Sinclair Refining Co.*, 286 F.2d 832, 838 (4th Cir. 1960); *Richfield Oil Corporation v. Karseal Corp.*, 271 F.2d 709, 712 (9th Cir. 1959).[7]

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[7] *Belliston v. Texaco, Inc.*, 455 F.2d 175 (10th Cir. 1972), on which Citgo relies, is distinguishable. There Belliston's attorney stipulated that Texaco had not engaged in any

(Footnote continued on following page)

B. *Evidence of Proximate Cause Was Sufficient*

Citgo contends that its actions did not cause plaintiff's injuries. Plaintiff showed that losses occurred after 1971 when Citgo dropped plaintiff as TBA supplier to its 50 south side dealers in favor of Berry Tire. Plaintiff also showed that sales to Citgo dealers dropped from approximately 90% of its business to an insignificant amount. It may be true, as the trial court found, that some of plaintiff's losses were attributable to other causes as well,[8] but plaintiff is required to show only that Citgo's antitrust conduct "materially contributed" to its injury. *Neiman Co. v. Kroehler Mfg. Co.*, 428 F.2d 726, 729 (7th Cir. 1970). Since by December 1975 the Citgo-Berry Tire arrangement seemingly excluded plaintiff almost entirely from its former market,[9] plaintiff's

[7] *continued*
coercive conduct. Here the existence of coercion is precisely the disputed issue. *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701 (7th Cir. 1977), certiorari denied, 439 U.S. 822, and *Juneau Square Corp. v. First Wisconsin National Bank of Milwaukee*, 624 F.2d 798 (7th Cir. 1980), are inapt. In the former, this Court held in pertinent part that the trial court's verdict against plaintiff after a full bench trial was not clearly erroneous. In the latter case, the issue was whether the trial court had abused its discretion in granting a new trial or committed reversible error in the second trial. Here the question is whether there was sufficient evidence to go to the jury. Moreover, the substantive issues are not on point. *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549 (7th Cir. 1980), is also of no help to Citgo. There the complaint was dismissed for failure to allege the requisite anti-competitive effect for a Rule of Reason case. This is not the problem here.

[8] The trial court recognized that because of its ruling on the coercion issue, a discussion of proximate cause was unnecessary. It nevertheless went on to state that plaintiff's decline was attributable to the termination of Citgo's contract with plaintiff and the "over-extended financial posture of" plaintiff, which made it impossible for plaintiff to acquire another product line. (App. 8-9.)

[9] For the years 1971 through 1975, the following table shows plaintiff's and Berry Tire's TBA sales to Citgo independent dealers (Pl. Br. 23-24 and Reply Br. 19):

(Footnote continued on following page)

damages should be based on the sales it would otherwise have made but for the alleged antitrust violations. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124-125; Page, *Antitrust Damages and Economic Efficiency: An Approach to Anti-trust Injury*, 47 U. Chi. L. Rev. 467, 486 (1980). And since plaintiff, on the basis of its *prima facie* case, was forced out of business by defendant in December 1975, plaintiff's fair market price would also be recoverable. *Id.* at 486.

C. *Testimony on Damages Was Adequate*

Plaintiff's expert on damages was Dr. Joseph Trosper, Professor of Finance at the University of Indiana. His computations are not challenged by Citgo. The district court found though that Dr. Trosper's testimony was inadequate to establish a *prima facie* case of damages. It objected to Dr. Trosper's estimates first because of the use of 1969 as the base year for profit tabulation when 1970 was the last calendar year of plaintiff's contract with Citgo and because 1969 was one of only two profitable years in a 5-year period. The court also thought the profit figure used by Dr. Trosper for 1969 was questionable because there were three figures for 1969: "a tax return figure, a draft financial statement and an actual financial statement," so that the court could not decide which was the correct base figure to use (App. 10).

We hold that it was permissible for Dr. Trosper to use 1969 as the base year because Citgo was already using Berry Tire instead of plaintiff in the latter part of 1970, thereby making 1970 an abnormal year. Moreover, since plaintiff's gross sales had been increasing progressively

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[9] *continued*

Year	Berry Tire	Plaintiff
1971	$112,379.58	$140,760
1972	189,632.36	72,064
1973	142,564.86	84,790
1974	119,906.92	51,859
1975	60,568.53	22,300

in 1967, 1968 and 1969, and since losses in the 5-year period are to some extent attributable to such exceptional events as destruction by a tornado, there were still other reasons to use 1969 to calculate plaintiff's future earnings absent antitrust violations by Citgo from January 1, 1971, when Berry Tire officially replaced plaintiff, and December 1, 1975, when plaintiff closed down. While Dr. Trosper used $16,500.44 shown on plaintiff's financial statement as the net profit on plaintiff's sales in 1969 instead of $10,441.89 shown on plaintiff's loan application to Citgo, the damage computation of $258,947 in lost earnings could be recomputed downward if the jury decided the net profit for 1969 was the lower figure.[10]

The trial court was also unwilling to accept the data which plaintiff's witness used to project growth rate because the companies relied on were not comparable companies with comparable problems and because the data did not take into account the loss of profits that, in the court's view, would have occurred even if Citgo had not engaged in illegal activities (App. 11). But it was permissible for Dr. Trosper to conclude that Citgo's illegal conduct caused plaintiff to lose business because at that point plaintiff's evidence stood uncontradicted. In the absence of statistics for wholesale tire distributors, it was also proper for Dr. Trosper to use a 9% annual growth rate for plaintiff based on the average growth rate of TBA manufacturing companies, which he explained would be approximately the same growth rate as that of their distributors. Indeed, Citgo itself had used a 10% growth factor in projecting plaintiff's sales when considering plaintiff's loan application. We conclude, therefore, that Dr. Trosper's profit damage estimate was properly based and note that in any event alternative theories of damages showing lost earnings of $183,257.34 and $204,674.01 respectively were advanced by plaintiff but unaddressed by the district court.

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[10] Plaintiff suggests that $16,500.44 is the right figure because the lower one was only for federal income tax purposes.

Finally, Dr. Trosper's computation of $193,718 as plaintiff's December 1, 1970, fair market value absent wrongful deprivation of its customers was based on a 9.25% average capitalization rate for all industry applied to a conservative 5-year average earnings figure of $22,399, reduced by 20% income tax. Since plaintiff would be entitled to "going concern" value if its proof that Citgo destroyed its business is not overcome, this testimony was appropriate for jury consideration. The district court's estimate that plaintiff was over-extended and financially shaky only applies after Citgo replaced plaintiff with Berry Tire. Even Citgo's February 1971 comments on a loan application from plaintiff show that plaintiff's credit experience was "excellent," with no past due balance, and with successful operations from 1952 to 1971 (App. 39-45).

In view of the foregoing, it was erroneous to direct a verdict for defendant on the ground that there was insufficient proof of damages.

D. *Exclusion of Evidence*

Although listed as the third issue on appeal, plaintiff's opening brief scarcely argues (and without any supporting authority) that Judge McGarr should have received in evidence the 1964 illegal sales commission arrangement between Citgo and Uniroyal, giving 7½% commission to Citgo on TBA purchased by its dealers, to show that the June 1, 1966, change to a purchase-resale agreement which gave Citgo a middleman profit of 7 to 8.5% on Citgo's sales of Uniroyal TBA to plaintiff for resale to Citgo dealers was just a change in form and not in substance.[11] In its reply brief plaintiff relies on Rule 401 of the Federal Rules of Evidence, *United States v. 1,129.75 Acres of Land*, 473 F.2d 996, 999 (8th Cir. 1973) and Cleary, *Handbook of Illinois Evidence* (2d ed. 1963) 207, to support admissibility.

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[11] In its opening brief, Citgo mentions other "erroneous" exclusion of evidence but does not argue their admissibility nor show them as an issue. Consequently we do not address them.

"Relevant evidence" is so broadly defined in Evidence Rule 401 that the proffered evidence was clearly admissible thereunder. In *1,129.75 Acres of Land, supra*, the Eighth Circuit concluded that it was error for a district judge to keep out evidence of subsequent sales as an aid to determine market value, correctly stating (at 999):

> "The law of evidence in federal courts favors a broad rule of admissibility and is designed to permit the admission of all evidence which is relevant and material to the issues in controversy, unless there is a sound and practical reason for excluding it."

Similarly, Professor Cleary's handbook deplores the exclusion of supposedly prejudicial evidence because "all effective evidence is prejudicial in the sense of damaging the party against whom offered * * *."

Despite the above authorities which tend to support admissibility, the exclusion of this evidence was not reversible error because the district judge had discretion to exclude it under Evidence Rule 403 on the ground that its probative value was "substantially outweighed by the danger of unfair prejudice, [or] confusion of the issues * * *." At the retrial, the presiding judge will be free to reassess this proffered evidence and to decide whether it should be excluded under Rule 403.

III

On March 4, 1976, the court below (Judge Grady) granted summary judgment to defendant on its counterclaim in the amount of $42,580.03 plus interest for goods sold to plaintiff before the Citgo switch from plaintiff to Berry Tire in late 1970. The correctness of this judgment is before us in appeal No. 76-1398.

Plaintiff does not contest the amount of the judgment but contends it was impossible to dispose of these Citgo batteries and Uniroyal tires because defendant coerced its independent stations to deal with Berry Tire in lieu of plaintiff. The record shows that defendant's credit

manager told one of plaintiff's officers that plaintiff's financial predicament "was Citgo's fault and he was not going to push me on payment of this particular indebtedness * * *" (Tr. 1098). Nevertheless Citgo filed a suit to collect this amount in 1974 before this antitrust suit was filed by plaintiff. Defendant renewed the demand in its counterclaim herein.

Defendant relies, as did the district judge, exclusively on *Kelly v. Kosuga*, 358 U.S. 516, 521, in support of summary judgment for defendant. There, however, respondent's antitrust conduct did not prevent the petitioner from selling the products (onions) he had purchased from respondent, so that the Court gave effect to respondent's sale of onions to petitioner at a fair price despite the fact that the contract between them was part of an illegal price-fixing scheme. Here, if proved, defendant's antitrust violations did prevent plaintiff from reselling these goods, and plaintiff has not been shown to be *in pari delicto*. Therefore, it was premature to grant summary judgment on the counterclaim until plaintiff's antitrust allegations are finally resolved after a full trial. If the jury decides the Sherman and Clayton Act charges in plaintiff's favor, then defendant should not be permitted to recover on its counterclaim. *Milsen Co. v. Southland Corp.*, 454 F.2d 363, 368 (7th Cir. 1971); *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 753, 769 (6th Cir. 1965); *Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc.*, 307 F.2d 207 (3d Cir. 1962).

Judgments reversed in Nos. 76-1398 and 80-1187, and the combined case is remanded for trial.[12]

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[12] Circuit Rule 18 will apply.

410 F.Supp. 1222 (1976)

TIRE SALES CORPORATION,
a corporation, Plaintiff,

v.

CITIES SERVICE OIL COMPANY,
a corporation, Defendant.

No. 74 C 599.

United States District Court,
N. D. Illinois, E. D.

March 4, 1976.

MEMORANDUM OPINION

GRADY, District Judge.

Prior to January 1, 1971, the plaintiff, Tire Sales Corporation, was a distributor for the defendant, Cities Service Corporation (hereinafter sometimes called "Citgo") of automotive tires, batteries and accessories ("TBA") for resale to Citgo dealers on the south side of Chicago. This treble damage antitrust action arises from the termination of the distributorship agreement by Cities Service and the alleged subsequent elimination of Tire Sales from the market of wholesale sales to Citgo dealers.

Tire Sales filed its complaint under Section 4 of the Clayton Act, 15 U.S.C. Sec. 15, alleging a tying arrangement, group boycott, allocation of markets, exclusive dealing and reciprocal dealing in violation of Section 1 of the Sherman Act, 15 U.S.C. Sec. 1, and Section 3 of the Clayton Act, 15 U.S.C. Sec. 14. In addition, Tire Sales alleges that Cities Service monopolized, attempted to monopolize and conspired to monopolize the sale of TBA to Citgo dealers in violation of Section 2 of the Sherman Act, 15 U.S.C. Sec. 2. Cities Service denies the alleged violation and counterclaims against Tire Sales for the purchase price of certain goods. Individual counterdefendants are two shareholder

officers of Tire Sales, George Nordstrom and Edward Laughlin, alleged guarantors of payment.

The parties have each filed motions for summary judgment, supported by various depositions, affidavits, answers to interrogatories, and other documents.[1]

An understanding of this case requires a description of the distribution of petroleum and TBA to Citgo dealers. Citgo dealers are independent businessmen who enter into separate agreements with Cities Service to lease service stations and to buy petroleum products. The agreements are for terms varying from one month to one year, and are terminable upon notice of from one month to 90 days.

In its sales of TBA to its dealers, Cities Service uses what is called the "purchase-resale" system. Under this method, it purchases the products from manufacturers and resells them to a distributor, which, in turn, resells to the dealer. The products are shipped directly from the manufacturer to the distributor, with Cities Service being billed. Cities Service makes its profit by charging the distributor a higher price then it pays the manufacturer. The defendant does not explicitly require its dealers to purchase TBA from its distributor; according to Cities Service, its dealers are free to purchase whatever brands of TBA they choose from whatever distributors they choose.

The purchase-resale method of TBA distribution was first used in late 1965. Until then, Cities Service, along with other major oil companies, used the "sales-commission" system, in which the oil company agreed to "sponsor" the sale of a certain manufacturer's TBA to its dealers in exchange for a commission from the manufacturer. This differed from the purchase-resale method in that the oil company did not purchase the product itself, but instead acted as a sales agent. Cities Service abandoned the sales-commission method after the Fed-

[1] Tire Sales' motion is for summary judgment on the issue of liability alone.

eral Trade Commission successfully challenged its use by other companies. As will be more fully explained below, the sales-commission plan was held to be a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. Sec. 45, in *Atlantic Refining Co. v. F.T.C.*, 381 U.S. 357, 85 S.Ct. 1498, 14 L.Ed.2d 443 (1965); *F. T. C. v. Texaco, Inc.*, 393 U.S. 223, 89 S.Ct. 429, 21 L.Ed.2d 394 (1968); and *Shell Oil Co. v. F. T. C.*, 360 F.2d 470 (5th Cir. 1966), *cert. denied*, 385 U.S. 1002, 87 S.Ct. 703, 17 L.Ed.2d 541 (1967).

The amount of business involved in Citgo's TBA sales is considerable. Cities Service's records show that in 1972 its purchases of TBA for direct or indirect resale to its dealers in the Chicago area totaled over $900,000.00.

Under both the sales-commission and purchase-resale systems, the tire company whose products Cities Service sponsored on the south side of Chicago was, until January 1, 1971, Uniroyal, Inc.[2] Because it was then a Uniroyal distributor, Tire Sales was used by Cities Service as its distributor. Cities Service terminated its agreement with Uniroyal in late 1970 and entered into contracts with Firestone and Goodyear instead, allegedly because of the declining public acceptance of Uniroyal tires. (It should be noted, however, that Tire Sales' purchases of Uniroyal tires under Cities Service's purchase-resale plan increased dramatically in 1970 over the previous two years.[3]).

Cities Service, apparently reluctant to lose Tire Sales as a distributor, attempted to aid Tire Sales in efforts to obtain a Goodyear or Firestone distributorship. These efforts proving fruitless, Cities Service replaced Tire Sales with Berry Tire Company, a Goodyear and Firestone distributor.

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[2] Although during part of the relevant time period the company was known as United States Rubber Co., we will, for convenience, refer to it only as Uniroyal.

[3] In response to an interrogatory, Cities Service reported that sales of tires to Tire Sales increased from $88,359.00 in 1968, and $83,568.00 in 1969 to $143,175.00 in 1970.

Although Cities Service asserts that its dealers are not required to buy its TBA, Tires Sales' business among Citgo dealers was destroyed after the termination of its distributorship contract. In 1971, its sales to Citgo dealers were less than a tenth of what they had been the previous year, and the following year they fell to zero.

The parties sharply dispute the reason for the capture of the Citgo wholesale market by Berry. Cities Service contends that it was the result of legitimate sales efforts directed by it and Berry at the dealers. It denies that any coercion was used. Its salesmen, often in the company of Berry personnel, made weekly trips to the stations to discuss TBA sales. Defendant also provided TBA advertising and display material for the stations. In addition, Cities Service several times a year helped sponsor "TBA Fairs," at which Citgo dealers, generally after being treated to drinks, dinner and door prizes, were solicited for TBA products available through the "approved" distributor. One of these Fairs, called a "Spring Fling," was held by Cities Service and Berry at Berry's warehouse on March 31, 1971, for the purpose of acquainting the dealers with Berry.

According to depositions of several present and former Citgo dealers, Cities Service engaged in more than mere salesmenship. For example, dealers testified that if they failed to buy from Berry, they were threatened with cancellation of their leases, and one dealer testified that Cities Service refused to make needed repairs of the station premises. Several dealers who refused to buy from Berry had their leases terminated or changed to shorter terms shortly thereafter. One such dealer terminated the lease himself after his yearly lease was replaced with a monthly one. There is no direct evidence in the record, however, that the failure to buy from Berry was the cause of termination of a lease.

In its counterclaim, Cities Service asserts, and the counterdefendants do not dispute, that Tire Sales has failed to pay for goods received from Citgo during 1970-71 and that Nordstrom and Laughlin have failed to pay

under their personal guarantee. The counterdefendants' only defense is that the claim arose in the course of Citgo's violations of the antitrust laws.

In disposing of the cross motions for summary judgment, we observe at the outset that summary judgment is frequently inappropriate in antitrust cases, "where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458, 464 (1962). In deciding these cross motions, the evidence must be viewed most favorably to the party opposing the motion. *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 89 S.Ct. 1391, 22 L.Ed.2d 658 (1969).

TYING ARRANGEMENT

When the evidence is so viewed, we must deny both parties' motions as they pertain to the tying-arrangement aspect of this case. A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from another supplier." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5-6, 78 S.Ct. 514, 518, 2 L.Ed.2d 545, 550 (1958). The practice is made illegal by Section 3 of the Clayton Act if the tying product is a commodity; otherwise, it is outlawed by Section 1 of the Sherman Act. Thus, in the present case, if TBA is regarded as tied to sales of petroleum products, the practice violates the Clayton Act; if the tie is only to the service station leases, it violates the Sherman Act.[4] *See Lessig v. Tidewater Oil Co.*, 327 F.2d

[4] The plaintiff in a private tying-arrangement case is usually a party upon whom the tie-in has been imposed, rather than the defendant's competitor, as here. However, because the plaintiff alleges a direct injury by the restraint, it has standing to sue. For another tie-in suit brought by a competitor, see *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920, 90 S.Ct. 928, 25 L.Ed.2d 101 (1970).

459 (9th Cir. 1969), *cert. denied*, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964).

The law looks at tying arrangements with such disfavor that, if certain threshold elements are present, they are regarded as *per se* illegal, despite any possible defenses on grounds of reasonableness that may be offered. *Northern Pacific, supra*, 356 U.S. at 5, 78 S.Ct. at 518, 2 L.Ed.2d at 549. To apply the *per se* rule, it must be shown, first, that there is in fact a tying arrangement. Second, the defendant must possess sufficient power in the market for the tying product to impose an appreciable restraint in the market for the tied product. Finally, a not insubstantial amount of commerce in the tied product must be involved. In Clayton Act cases, the plaintiff must prove only one of the last two elements; in Sherman Act cases, both of them. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed.2d 1277 (1953).

We find a genuine dispute as to whether the first of these elements is present. The plaintiff has produced evidence that the defendant coerced its dealers into buying TBA from Berry. Such coercion included threats to cancel service station leases and refusal to perform repairs. If the defendant proves these allegations at trial, a tie-in would clearly be established.[5] Even in the absence of overt coercion, dealers may have been induced to purchase from Berry Tire because of the inherent power which the defendant possessed as the company upon which the dealers depended in almost

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[5] *Osborn v. Sinclair Refining Co.*, 286 F.2d 832, 836 (4th Cir. 1960), *cert. denied*, 366 U.S. 963, 81 S.Ct. 1924, 6 L.Ed.2d 1255 (1961); *United States v. Sun Oil Co.*, 176 F.Supp. 715 (E.D.Pa. 1959); M. E. Wheeler, *Some Observations on Tie-ins, the Single Product Defense, Exclusive Dealing & Regulated Industries*, 60 Cal.L.Rev. 1557, 1571 (1972); *cf. Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704, 89 S.Ct. 1391, 1393, 22 L.Ed.2d 658, 662 (1969). In *Phillips v. Crown Central Petroleum Corp.*, 395 F.Supp. 735 (D.Md. 1975), the tie-in was incorporated in the dealer contract.

every aspect of their business. In *F.T.C. v. Texaco, Inc.*, 393 U.S. 223, 89 S.Ct. 429, 21 L.Ed.2d 394 (1968), the Supreme Court held that the sales-commission method of TBA distribution violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. Sec. 45, because the oil company, as a result of the inherent nature of the petroleum distribution system, exercised dominant control over its dealers in inducing them to buy sponsored TBA products. No overt coercion was used. *See also Shell Oil Co. v. F.T.C.*, 360 F.2d 470 (5th Cir. 1966), *cert. denied*, 385 U.S. 1002, 87 S.Ct. 703, 17 L.Ed.2d 541 (1967). Although the court was dealing with the F.T.C. Act, we interpret its discussion, essentially one of factual interpretation, to be applicable to the Sherman and Clayton Acts as well.[6] The plaintiff has produced facts similar to those involved in *Texaco* and *Shell*; if believed, they would show that the reason dealers were buying TBA from Berry rather than Tire Sales was that Berry was the defendant's distributor and not because Berry's TBA were inherently preferable.[7]

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[6] Several post-*Texaco* cases, none from this Circuit, have held that the sales-commission plan is not a *per se* violation of the Sherman and Clayton Acts. *Abercrombie v. Lum's, Inc.*, 345 F.Supp. 387, 391-92 n. 10 (S.D.Fla. 1972); *Lee Nat'l Corp. v. Atlantic Richfield Co.*, 308 F.Supp. 1041 (E.D.Pa. 1970) (involving same arrangement as *Atlantic Refining*). In *Bellis-ton v. Texaco, Inc.*, 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928, 92 S.Ct. 2494, 33 L.Ed.2d 341 (1972), the court held that the sales-commission plan was not *per se* illegal and, without explaining its reasons, remanded the case not for a determination under the rule of reason, but rather for judgment for defendant.

[7] In an attempt to avoid liability, Cities Service has argued this motion as though the case concerned only a termination of a distributorship contract. If that were truly all that were involved here, there would be no antitrust violation. *Burdett Sound, Inc. v. Altec Corp.*, 515 F.2d 1245 (5th Cir. 1975). Cities Service's actions are alleged to have gone beyond mere termination of a contract, however. When Tire Sales remained in the business of distributing TBA, plaintiff contends that Cities Service took actions designed to prevent it from selling to Citgo dealers.

The defendant, however, has disputed the evidence presented by the plaintiff and has produced evidence that during 1970 it was disturbed by what it perceived to be a declining public acceptance of Uniroyal Tires, and therefore transferred its business to Goodyear and Firestone. On the evidence before us, it is conceivable that the Citgo dealers, either on their own or because of salesmanship efforts limited to this one selling point, came to the same conclusion. *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963, 81 S.Ct. 1924, 6 L.Ed.2d 1255 (1961); *cf. Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273 (1954). If so, and if that were the only reason for the massive switch from Tire Sales to Berry Tire, then there would be no tie-in. Whether that is the most likely conclusion from the facts before us is irrelevant; it is a disputed issue of fact and therefore a trial must be held. At the trial, the major question will be whether, either because of overt coercion or the power that Cities Service possessed over its dealers resulting from the nature of the petroleum distribution system, the dealers were induced to make TBA purchases for reasons other than those which motivate a reasonable buyer in a free market—namely, price, quality and the like.[8]

Because of the necessity of a trial in this case, we find it advisable to outline what we do not regard as disputed issues of material fact. We think that the undisputed facts show clearly that the last two of the three elements of a *per se* illegal tying arrangement are present. It has been demonstrated beyond dispute that the market-power element is present; the defendant's position in relation to its dealers clearly gives it the power to impose the tie-in on an appreciable number of buyers in

[8] It would not avail the defendant that some dealers continued to stock a certain amount of competitive TBA; the free market mandated by the Sherman and Clayton Acts is distorted whenever a buyer is induced to buy any amount of a tied good because of a tie-in. *See United States v. Sun Oil Co.*, 176 F.Supp. 715, 719 (E.D.Pa. 1959).

the market. Indeed, a year after the defendant allegedly began tying purchases of Berry's TBA to its petroleum sales and service station leases, the plaintiff could find no Citgo dealer who would buy from it. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 503-04, 89 S.Ct. 1252, 1258-59, 22 L.Ed.2d 495, 505-06 (1969); *McMackin v. Schwinn Bicycle Co.*, 354 F.Supp. 1154 (N.D.Ill. 1973). The requisite amount of commerce is also indisputably demonstrated. In the Chicago area alone, Cities Service purchased $900,000.00 worth of TBA for eventual resale to its dealers in 1972, one of the years in question and the only year for which we have been presented figures. This amount is clearly sufficient. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969) ($200,000.00 held to be sufficient); *International Salt Co. v. United States*, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947) ($500,000.00); *Phillips v. Crown Central Petroleum Corp.*, 395 F.Supp. 735 (D.Md. 1975) (120,000 gallons of motor oil held sufficient).

We hold one other contention of the defendant irrelevant in this case. The defendant has asserted that it acted in good faith by attempting to obtain a Goodyear or Firestone distributorship for the plaintiff so that it could continue to sell to the Citgo dealers. This would not be a defense. Antitrust liability cannot be avoided by proof that the defendant would have employed the plaintiff in its illegal scheme if only it could have.

OTHER ALLEGED VIOLATIONS OF SECTION 1 OF THE SHERMAN ACT AND SECTION 3 OF THE CLAYTON ACT

The plaintiff has alleged that the same practices which it has asserted constitute a tying arrangement also constitute an illegal group boycott, allocation of territory, exclusive dealing and reciprocal dealing. In our view, the defendant's alleged acts can be most closely characterized as a tying arrangement. *Standard*

Oil Co. of Cal. and Standard Stations v. United States, 337 U.S. 293, 305-8, 69 S.Ct. 1051, 1058-59, 93 L.Ed. 1371, 1381-83 (1949); D. I. Baker, *Another Look at Franchise Tie-Ins after Texaco and Fortner*, 14 Antitrust Bull. 767 (1969). Nevertheless, it is often difficult to confine the characterization of an act to a single category. A tie-in, looked at from the point of view of a competitor of the seller is also a group boycott since the purchasers have agreed with the seller not to buy from the competitor. It can be an exclusive dealing arrangement as well if the buyers agree to purchase the tied product from the seller exclusively.

It is, therefore, proper for Tire Sales to proceed to trial on several theories. *Robertson v. National Basketball Association, Inc.*, 389 F.Supp. 867 (S.D.N.Y. 1975) (the same activity characterized as group boycott, horizontal territorial and product allocation, and as analogous to a price-fixing scheme). Since a trial will need to be held on the tying arrangement allegation anyway and since the disputed issues of material fact concerning the tie-in are also involved in the other alleged violations, we deny the cross motions for summary judgment on these other issues.

Our reading of the facts in this case, however, fails to reveal any basis for the allegation of reciprocal dealing which is an agreement to buy only if the seller in turn agrees to purchase a different product from the buyer. Therefore, we will grant the motion as it relates to this allegation.

MONOPOLIZATION, ATTEMPT TO MONOPOLIZE AND CONSPIRACY TO MONOPOLIZE

This case illustrates Professor Handler's astute observation that "(m)ost Sherman Act litigation arises under Section 1, with a Section 2 charge thrown in as a mere make-weight." Handler, *Some Misadventures in Antitrust Policymaking—Nineteenth Annual Review*, 76 Yale L.J. 92, 109 (1066) (footnotes omitted). Tire Sales has

alleged that the same activity which violates Section 1 of the Sherman Act and Section 3 of the Clayton Act also violates Section 2 of the Sherman Act as monopolization, an attempt to monopolize and a conspiracy to monopolize. We will grant the defendant's motion for summary judgment as it relates to monopolization and attempt to monopolize, but deny both motions as they relate to a conspiracy to monopolize.

In *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778, 786 (1969), the Supreme Court defined monopolization as follows:

> The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Thus, to establish a claim of monopolization, the plaintiff must define the relevant market, which is the geographic market "composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377, 404, 76 S.Ct. 994, 1012, 100 L.Ed. 1264, 1285 (1956).

The plaintiff has asserted that the relevant market is that of wholesale sales of TBA to Citgo dealers. This definition is far too narrow. Although it is conceivable that in certain cases, Section 2 could be violated by monopolizing the distribution of a single product or the purchases of a single buyer, this is not such a case. *See duPont, supra*, 351 U.S. at 393, 76 S.Ct. at 1006, 100 L.Ed. at 1279-80; *Mullis v. ARCO Petroleum Corp.*, 502 F.2d 290 (7th Cir. 1974). It is undisputed here that the TBA sold by Cities Service compete with other TBA on the basis of both price and quality. It is also undisputed that TBA distributors complete among themselves for the purchases of all service stations and other retail

outlets, not just Citgo dealers. The relevant market can be defined no narrower than the wholesale market of TBA on the south side of Chicago. Cities Service comes nowhere near controlling even close to a monopoly share of this market. In *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945), Judge Learned Hand expressed doubt that 64 per cent of the market is a monopoly share and stated that 33 per cent definitely is not, Cities Service controls only a minuscule share of the sales of TBA to service stations.[9]

The plaintiff has tried to circumvent this problem by adding an allegation of attempt to monopolize and asserting that to support such an allegation the relevant market need not be defined. The Ninth Circuit in a

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[9] We reach this conclusion despite some misleading statistics presented to the Court by Cities Service. In its brief, it asserts, "Exhibit C reveals that Citgo's share of the TBA market in relation to other gasoline outlets has diminished from 5.1 per cent in 1970 to 4.7 percent in 1974." Exhibit C, however, reveals nothing of the sort. The numbers mentioned actually represent the percentage of Citgo TBA sales to Citgo gasoline sales in the Chicago metropolitan area, not to total service station TBA sales. They were derived by dividing the dollar amounts of Citgo TBA sales in the Chicago area into the dollar amounts of total Citgo gasoline sales in that area. Cities Service also purported to show that its share of the Chicago area gasoline market varied between one and one-and-a-half percent between 1970 and 1974. A close examination of its statistics, however, reveals that these percentages were derived by dividing Citgo Chicago area sales into the total highway gasoline consumption in *Illinois*.

However, it is clear that defendant's share of the south side TBA market is extremely small and nowhere near the requisite contol needed to violate Section 2. In *South End Oil Co. v. Texaco, Inc.*, 237 F.Supp. 650 (N.D.Ill. 1965), the court granted defendant's motion for summary judgment on an allegation of both monopolization and attempt to monopolize where the plaintiff's petroleum distributorship had been cancelled. Without citing any market evidence , the court held that the defendant clearly did not have the requisite market control. Similarly, here it cannot justifiably be said that the defendant has the necessary control of the market to support an allegation of monopolization.

series of cases beginning with *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964), had developed the rule that, where the defendant has committed a substantial restraint of trade amounting to predatory conduct, the plaintiff can make out a case of attempt to monopolize without demonstrating that the defendant had any power in the relevant market. This rule has had a shaky history in the Ninth Circuit[10] and has been widely disapproved by other courts.[11] The rule followed by most courts is that an attempt to monopolize requires the specific intent to obtain monopoly power in the relevant market and a dangerous probability of success. *George F. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974). It is settled in this Circuit and others that the definition of the relevant market is an essential element of an action alleging attempt to monopolize. *Mullis v. ARCO Petroleum Corp.*, 502 F.2d 290, 295 (7th Cir. 1974); *Bernard Food Industries, Inc. v. Dietene Co.*, 415 F.2d 1279 (7th Cir. 1969), *cert. denied*, 397 U.S. 912, 90 S.Ct. 911, 25 L.Ed.2d 92 (1970); *Brewer Sewing Supplies Co. v. Fritz Gegauf, Ltd.*, 1970 Trade Cas. Par. 73,139 (N.D.Ill.

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[10] Recently, the Ninth Circuit reversed a district court's decision that the defendant was guilty of attempting to monopolize on the ground that the court had misdefined the relevant market. The court held that the relevant market was important in determining whether a restraint of trade is substantial enough to rise to a Section 2 violation. *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975). *See* E. H. Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 Mich.L.Rev. 373 (1974).

[11] *Lessig* was especially disapproved in *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004, 95 S.Ct. 2407, 44 L.Ed.2d 673 (1975); *Acme Precision Products, Inc. v. American Alloys Corp.*, 484 F.2d 1237, 1240 (8th Cir. 1973); *Diamond International Corp. v. Walterhoefer*, 289 F.Supp. 550, 575-77 (D.Md. 1968); *Becker v. Safelite Glass Corp.*, 244 F.Supp. 625, 637 (D.Kan. 1965); *see also McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332 (4th Cir. 1959).

1970). In *Brewer Sewing Supplies Co. v. Fritz Gegauf, Ltd.*, 1970 Trade Cas. Par. 73,139 (N.D.Ill.1970), the court dismissed a complaint alleging that the defendant had attempted to monopolize the sale of a single product. The ground for dismissal was failure sufficiently to allege a relevant market. In *South End Oil Co. v. Texaco, Inc.*, 237 F.Supp. 650 (N.D.Ill.1965), the court granted summary judgment to the defendant where the plaintiff had alleged that the defendant, by termination of the plaintiff's distributorship, had attempted to monopolize the distribution of its own motor oil. The court held that, in view of the plaintiff's testimony that all motor oils were comparable and competitive, the relevant market could not be so limited. For purposes of this issue, the present case is similar, and we grant the defendant's motion for summary judgment on the issue of attempt to monopolize.

We cannot, however, grant the defendant's motion for summary judgment on the conspiracy-to-monopolize allegation. In *United States v. National City Lines*, 186 F.2d 562 (7th Cir. 1951), *cert. denied*, 341 U.S. 916, 71 S.Ct. 735, 95 L.Ed. 1351 the Seventh Circuit held in a case very like the one at bar that the defendants were guilty of a conspiracy to monopolize under Section 2. The defendants, various suppliers, local transportation companies in different cities and a transportation holding company, had been charged with conspiring to monopolize the sale of buses, petroleum products, tires and tubes to the transportation companies by means of reciprocal dealing. Cities Service, charged with conspiring to monopolize the purchases of the Citgo dealers, is in the position of the suppliers in *City Lines*. The decision was concerned with the proper interpretation of Section 2's requirement that the conspiracy be to monopolize "any part" of commerce. The court rejected the defendant's argument that they could not have conspired illegally to monopolize the purchases of a single buyer, or several buyers in several different geographical markets, and held that the requirement concerning "any part" of commerce meant merely that a

large volume of commerce be affected. The relevant market was never defined.

We have serious reservations about the *City Lines* holding. The decision is contrary to the thrust of the law as interpreted by other courts, which hold that the relevant market is an element of a vertical conspiracy as well as other violations of Section 2.[12] *American Football League v. National Football League*, 323 F.2d 124 (4th Cir. 1963); *United States v. Johns-Manville Corp.*, 231 F.Supp. 690 (E.D.Pa.1964). The *City Lines* court principally relied on *United States v. Yellow Cab Co.*, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947). The Supreme Court in that case, however, held not that the relevant market was not important in a conspiracy case, but rather that Section 2 does not require a nationwide monopoly, the words "any part" meaning merely any relevant market which constitutes a part of interstate commerce. Moreover, it is difficult to see why "any part" should be defined differently in a conspiracy case than in a monopolization or attempt-to-monopolize case, where it still requires definition of a relevant market.

Nevertheless, *City Lines* is still the law in this Circuit, and we must deny the defendant's motion regarding the conspiracy allegation.

The plaintiff's motion for summary judgment is also denied for the same reasons that it was denied under Section 1 of the Sherman Act and Section 3 of the Clayton Act.

THE COUNTERCLAIM

Tire Sales and its officers who guaranteed payment do not dispute that they failed to pay the defendant for goods received. The counterdefendants' only defense is that the contract is illegal under the antitrust laws. It is unclear whether the illegality that is the defense was

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[12] The rule may be different as regards horizontal conspiracies to monopolize. *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961).

committed before or after the plaintiff's distributorship was terminated, but, in any event, we disagree that this defense is valid. Accordingly, we grant summary judgment for Cities Service on the counterclaim.

The limited use of an antitrust defense to an action on a contract was established in *Kelly v. Kosuga*, 358 U.S. 516, 79 S.Ct. 429, 3 L.Ed.2d 475 (1959). In that case the plaintiff sued the defendant for non-payment for 50 cars of onions, and the defense was that the sale had been made in furtherance of a conspiracy to keep prices high by preventing large amounts of onions from being sold on the futures market. The court rejected this defense and held that a defense of an antitrust violation is limited to situations where the court would be enforcing the precise conduct condemned by the Act:

> Where, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself, we do not think it inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question. (358 U.S. at 521, 79 S.Ct. at 432, 3 L.Ed.2d at 479.)

The plaintiff's remedy for the alleged antitrust violation is limited to the treble damages provided by the Clayton Act. It does not include as well the privilege of not paying for goods received.

Because there is no just reason for delay, we will enter judgment for the defendant on the counterclaim under Rule 54(b), Fed.R.Civ.P. In view of the possibility that the counterclaim will be offset by recovery under the plaintiff's complaint, however, we will stay enforcement of this judgment until entry of judgment on the other aspects of this case. *See Emerson Radio & Phonograph Corp. v. Hendrix*, 20 F.R.D. 572 (S.D.N.Y.1957); Moore's Federal Practice, Paragraph 56.17(15).

Accordingly, the defendant's motion is granted insofar as it relates to the allegations of reciprocal dealing, monopolization and attempted monopolization, and judgment is entered in favor of the Cities Service Oil Com-

pany and against Tire Sales Corporation, George Nordstrom and Edward Laughlin in the amount of FORTY-TWO THOUSAND FIVE HUNDRED EIGHTY AND 03/100 DOLLARS ($42,580.03) on the counterclaim. Judgment on the counterclaim is stayed until judgment is entered on the other aspects of this case. In all other respects, the motions of both parties are denied.

[1358]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TIRE SALES CORPORATION,

Plaintiff,

No. 74 C 599 -vs-

CITIES SERVICE OIL CORPORATION,

Defendant.

Wednesday, the 9th day of January, 1980.

At the hour of 10:45 o'clock a.m.

Proceedings in the above-entitled matter before the HONORABLE FRANK J. MCGARR, and a jury, resumed pursuant to adjournment.

PRESENT:

MR. ROBERT W. BERGSTROM
MR. RONALD TEEPLE

appeared on behalf of the plaintiff;

MR. SAMUEL J. BETAR

and

MR. PAUL J. PETIT

appeared on behalf of the defendant.

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THE COURT: I don't think a response will be necessary, counsel, and we don't have time.

I've listened carefully to the argument, taken some notes, which I hope will become the basis for a reasonably orderly presentation of my ideas. But, I apologize in advance for the fact that having done this on the basis of listening to the argument, it's inevitable that I'm going to wander a bit, but I think I'll get it all in.

We've had a fairly long trial, I've heard much evidence. I do not think it's appropriate, because the

evidence is fresh in your minds and my mind, to delay my ruling on this motion, having heard the lengthly arguments, and therefore I intend these remarks to be my findings and conclusions in support of my ruling on the motion for directed verdict.

It's obvious that I have jurisdiction over the case and the parties and that the activities between Tire Sales and Citgo, which have been the subject of the evidence in this case, were in or affected interstate commerce. The jurisdictional basis of the case is adequate and satisfactory to me.

To state in a broad sweep the facts that I think are focal in the case, and at the risk of repeating in a

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simplified way what we all know so well because we've heard so much about it, it seems apparent to me by way of findings of fact, that in 1970, some time at least at the beginning of that year and for some years prior to that, Mr. Nordstrom and Tire Sales were selling tires, batteries and accessories, hereafter TBA, to Citgo dealers pursuant to an agreement with Citgo. The tires were Uniroyal tires, which was possible because Tire Sales had a franchise agreement with Uniroyal enabling it to sell that brand. Citgo's salesmen were pushing Tire Sales to the Citgo dealers, and Tire Sales, represented by Mr. Nordstrom, was furnishing figures and attending sales meetings at Citgo where Citgo sales representatives were urged to redoubled efforts on behalf of the selling of products by the dealers, which products Tire Sales furnished.

On January 1st, 1971, Berry Tire Sales was substituted by Citgo in this favored spot. What had been welcome practice when Tire Sales was the beneficiary then became an alleged antitrust violation when Berry Tire was the beneficiary. What precipitated the change, as the evidence clearly and without any controversy reflects, was that Citgo sold Uniroyal tires through its dealers. Tire Sales was a Uniroyal distributor. Citgo and Uniroyal came to a parting of the ways, and therefore

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the Uniroyal tires were no longer welcome at the Citgo dealers and Citgo made a deal or tried to with Firestone. This left Tire Sales in the position of handling the wrong brand of tire, and with the obvious need, which they quickly realized and began to work on, to get another franchise for another tire dealer, Firestone being the obvious one.

They were unable to bring this about, however, even with the encouragement and some considerable assistance from Citgo, because they owed Uniroyal $80,000. Efforts to borrow the money from Citgo to pay off Uniroyal and get a new franchise with Firestone, despite earlier favorable reactions at the lower levels or at the local levels of the Citgo administration, were finally vetoed in what I think I remember to be the Tulsa office. In any event, the bottom line was "No."

So, Tire Sales, unable to get the Firestone franchise, and Citgo, unwilling to further deal with Uniroyal, caused Citgo to switch to Berry Tire, which was an authorized Firestone dealer, and the sales representative starting pushing Firestone and Berry.

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Thereafter, Tire Sales lost much of the business of the Citgo dealers, and we then turn, that recitation of facts being substantially completed, to the issues in the case.

As has been stated in the argument, the two central issues in my mind in the case are the issue of coercion, whether or not it did exist, and the issue of damages, whether they were real damages and whether the damage projection and the testimony of Dr. Trosper constitutes evidence which is appropriate to send to a jury.

The coercion issue meant that there must be a prima facie establishment of the fact that the dealers were compelled to buy TBA from Berry, or compelled or coerced not to buy TBA from Tire Sales. This compulsion has to come, as the allegations indicate, from agents of Citgo. There is really no direct or any substantial

direct evidence of any threats to this effect. A few witnesses who testified that they felt threatened, felt threatened because of conclusions or inferences they drew either from the circumstances, or in a few instances, from remarks made to them. All of them felt vulnerable, as well they might, having leases and depending upon Citgo for their gas supply. But, this vulnerability is not, although it could be the instrumen-

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tality of coercion, is not proof of coercion, and the evidence discloses no actual cancellation of leases or reductions of gas supply, at least any which has been causally connected with the dealers' conduct vis-a-vis the willingness or unwillingness to purchase TBA from Berry.

When the switch to Berry came in the opening days of 1971, most dealers went along. Some refused, some resisted. Some dealers may have feared reprisals, but no evidence of reprisals or no compelling evidence that these fears were the results of these threats, real or implied, has appeared in the case. Some Citgo dealers continued with Tire Sales, despite the Citgo urgings to buy from Berry. There was no action undertaken by Citgo by way of failure to renew leases or reduction of gas supply or any other economic harm which followed upon the activities of these dealers. Any cancellations of leases has been adequately explained by the uncontroverted program of Citgo to convert its regular gas stations to Quik-Marts. The dealers, of course, knew that Citgo was phasing out, they obviously had fears of losing their business. They had a desire not to antagonize Citgo, particularly in the face of the Quik-Mart program. Most went along, therefore, with the switch to Berry Tire. That these fears and attitudes may have influenced the

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decision of the dealers does not amount to the conclusion or compel the conclusion that they were yielding to coercion.

The evidence in proof of coercion, therefore, is negligible. The direct proof that resistance to the switch to Berry produced any sanctions in the area of lease cancellations, gas supply or any other economic area is non-existent and therefore I conclude that there has been a failure by the plaintiff to establish a prima facie case of coercion.

I turn now to the second principal issue, the issue of damages, and the proof of damages. Assuming (in view of my first ruling it isn't necessary to assume), but assuming for purposes of this discussion that damages are a relevant issue in the case, first the projection of income and the value of Tire Sales Company, the valuation and the loss based thereon, are based on the assumption by Dr. Trosper and the plaintiff of normal continuing business relationships and growth. The fact that Citgo and Uniroyal had split, leaving Tire Sales without a tire product to sell to Citgo and the over-extended financial posture of Tire Sales at that time, which denied it another product line, that is Goodyear or Firestone, unless it could pay off debt, which it could not, are facts which render untenable the assumption that Tire Sales would have continued to grow and enjoy a normal

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business volume based upon its prior experience as a supplier to Citgo dealers. In addition, these facts are facts which by no stretch of the evidence can be deemed to be a fault of Citgo. The evidence reveals that in 1970, Tire Sales was an over-extended and financially shakey business, unable to pay Uniroyal and Citgo accounts owed and that the Citgo break with Uniroyal was the coup de grace which brought the beginning of the ultimate fatal decline of the Tire Sales Company, and that ultimate failure and decline cannot be attributable therefore to the activities of the defendant and cannot be the basis for a damage calculation which the plaintiff would like it to be.

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I have trouble also with the selection of 1969 as the base year for profit calculations, which selection is the key to the reliability of the projections. 1969, the last valid year, is really not the last calendar year. As we all know, 1970 was. There are some problems with 1970 as a base year, because 1970 was a normal year only through the autumn and became an abnormal year after that. The selection of 1969, however, ignored the fact that in a five year period, 1969 was one of only two profitable years. A five year average might have been a better basis, but I need not speculate on what might have been done other than the selection of 1969 as a base year. I do find that the 1969 base year formula was one that was not calculated to produce any true measure of the prospects of the company or its anticipated profits.

Secondly, the profit figure in 1969 is subject to question. There seems to be three figures, a tax return figure, a draft financial statement and an actual financial statement. The problem that the Court cannot ascertain which of these is the actual figure is a problem of the plaintiff and not the defendant. The profit calculation therefore, extrapolated from the 1969 figure is additionally speculative because the evidence supporting the base figure is so uncertain.

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So is the data of Dr. Trosper based on the projected growth rate. The companies he relied upon for an index of growth rate for the appropriate years were not comparable companies and they were not in comparable situations with Tire Sales with its problems with its best customer Citgo, and its problems with its loss of franchise.

I refused to strike Dr. Trosper's testimony. I did so because I thought it had some evidentiary value. But my conclusion is that it is not compelling and that it does not give me an adequate basis, nor would it give a jury an adequate basis for ascertaining an amount of

damages, and for that reason it's my conclusion there's a failure to establish a prima facie case of damages, which is the problem that the plaintiff has to deal with in facing up to the defendant's motion.

Dr. Trosper's testimony, to go on and comment on it, seems to ignore the fact that loss of profits on the wholesale side of the business were occurring and were going to continue to occur despite the activities of Citgo, and that the precipitating factor was the Uniroyal-Citgo fallout, and that Citgo could not continue a normal arrangement with the defendant until the defendant got

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a franchise, which his own factual and financial circumstances made impossible. Dr. Trosper's calculations are based upon the assumption that Citgo was engaged in some sort of a conspiracy to destroy or remove from its favored position the Tire Sales Company, which ignores the evidence that Citgo made good faith efforts to help Tire Sales get another franchise and that the reason for the failure was not Citgo, it was the financial situation of Tire Sales.

Finally, the valuation of the business, in accordance with Dr. Trosper's conclusions, is faulty because it depends upon applying a multiplier to the profit figure, a figure which I have already said I find totally unreliable. The method, therefore, of Dr. Trosper and his conclusions are questionable in terms of their evidentiary value, and for the reasons I have enunciated therefore, no prima facie case of damages has been established.

Let me, by way of making sure that I've touched all basis here, comment briefly on what I understand the allegations of the plaintiff to be, and indicate my reaction to them.

The first allegation I draw from the argument, and from the complaint, is the allegation that Citgo had an illegal tying arrangement because it tied leases and gas supplies to the required purchase of TBA.

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I find no sufficient proof to establish a prima facie case supporting that allegation.

The second is that Citgo illegally coerced the dealers not to buy from Tire Sales after 1971 when they substituted Berry Tire for Tire Sales. My conclusion as to that allegation is the same, the evidence does not establish a prima facie case in support of that contention.

The next allegation is that Citgo imposed illegal requirements on the dealers to buy all TBA from Berry. The evidence also fails to establish that allegation. There is no evidence concerning territorial market allocation and that allegation fails completely for want of proof.

The proof of loss of income or reduction in valuation of business, such that the jury might base a conclusion as to damages if liability were established, I find inadequate in accordance with my earlier comments. The problems of Tire Sales and the injury that Tire Sales suffered were due to several factors. Quick-Marts were one, the inability to get other than a Uniroyal franchise is another, and then their own financial situation where they were operating with substantial losses and minimal profit years, even under the favorable aegis of the Citgo

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arrangement is a third. Then finally, I find in the evidence a falling off of aggressive promotion of the wholesale business of Tire Sales after the unfortunate happenings of 1971, perhaps an indication of the recognition of the principals of that business of the hopelessness of their financial situation.

In any event, there is no causal link between Citgo activities and the sad financial plight of the plaintiff sufficient to establish the anti-trust violations alleged. Citgo's activities did not contribute materially or substantially to the already overwhelming financial slide of Tire Sales.

So, not finding any proof, either of coercion or sufficient evidence of damages to base a conclusion upon,

my conclusion must be that I grant the motion of the defendant for a directed verdict at the close of the plaintiff's case.

I think what I should do is call—well, let me say further, because I think this should be said. I genuinely sympathize with Mr. Nordstrom. He's obviously a fine man trying to build a business plagued by minimal profits, intermittent losses and the Citgo-Uniroyal battle was something totally beyond his control, but a final blow which leaves him in a sad situation. In an effort to rescue himself, he paid off Uniroyal first, over a long

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period, a year, I believe it was, then he paid off Citgo second, late, and only in part and he cannot finish paying them off, all part of a struggle to survive in what we all know is the heartless world of commerce. When he could not pay a final $40,000 balance, and after waiting some considerable time, Citgo sued.

Now, Mr. Nordstrom clearly owes the $40,000, and he clearly doesn't have it, and he counters with an antitrust allegation, which now, however sincerely he believed it or however capably Mr. Bergstrom advanced it, has failed of proof. I regret that the case had to turn out that way for Mr. Nordstrom's sake.

But, in any event, that's my view of the facts and my view of the law and that's my ruling on the case. I intend to call the jury in, gentlemen, and tell them that I've reached this conclusion and then we'll excuse them. Would you bring them in, Mr. Marshal, please.

JUDGMENT—ORAL ARGUMENT
Unpublished Per Curiam Order

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 7, 1980

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. EDWARD DUMBAULD, Senior District Judge*

TIRE SALES CORPORATION, et al.,
Plaintiff-Counterdefendants-Appellants,

No. 76-1398 vs.

CITIES SERVICE OIL COMPANY, a corporation,
Defendant-Counterplaintiff-Appellee.

* * * * *

TIRE SALES CORPORATION, a corporation,
Plaintiff-Appellant,

No. 80-1187 vs.

CITIES SERVICE OIL COMPANY, a corporation,
Defendant-Appellee.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 74-C-599—Judge John F. Grady and Judge Frank J. McGarr

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* The Honorable Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, is sitting by designation.

This cause came before the Court for decision on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and REMANDED in accordance with the order of this court entered this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 20, 1980.

Before
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. EDWARD DUMBAULD, Senior District Judge*

TIRE SALES CORPORATION, et al.,
Plaintiff-Counterdefendants-Appellants,

v.

CITIES SERVICE OIL COMPANY,
Defendant-Counterplaintiff-Appellee.

Nos. 76-1398, 80-1187

TIRE SALES CORPORATION,
Plaintiff-Appellant,

v.

CITIES SERVICE OIL COMPANY,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 C 599—John F. Grady and Frank J. McGarr, Judges.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendant-appellee, Cities Service Oil Company, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, is sitting by designation.

STATUTES INVOLVED

15 U.S.C. § 1

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. §14

§ 14. Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 15

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 45

§ 45. Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices

(a) (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the

Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.